

No. 15318

United States
Court of Appeals
for the Ninth Circuit

ROBERT F. ELLISON and CLEO A. (ELLI-
SON) WALKER, Appellants,

vs.

WILLIAM E. FRANK, United States District
Director of Internal Revenue for the District
of Washington and Territory of Alaska,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington
Southern Division

FILED

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PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, Western District of Washington, Northern Division

Civil No. 1938

ROBERT F. ELLISON and CLEO A. (ELLISON) WALKER, Plaintiffs,

vs.

WILLIAM E. FRANK, United States District Director of Internal Revenue for the State of Washington and The Territory of Alaska, Defendant.

COMPLAINT

Plaintiffs complain and allege:

1. This is an action brought pursuant to 28 U.S.C. Section 1340, to recover tax monies erroneously and illegally collected from plaintiffs by defendant, who at all times herein mentioned was and now is the duly appointed, qualified and acting United States District Director of Internal Revenue for the State of Washington and the Territory of Alaska, together with interest on said tax monies. At all times herein mentioned plaintiffs were husband and wife and were citizens and residents of the State of Washington, and were and now are citizens of the United States.

2. On or about March 15, 1950, plaintiffs filed with the defendant their income tax return on Form 1040 for the calendar year 1949 prepared on a cash basis, and the income tax liability disclosed on said return has been paid.

3. An internal revenue agent made an examination of plaintiffs' income tax return for the year 1949 and in a letter dated February 16, 1953, (Form 1200) addressed to plaintiffs, the defendant enclosed a copy of the report of examination dated November 28, 1952, which proposed a deficiency of \$11,839.10; the defendant assessed plaintiffs with deficiency in income taxes in the sum of \$11,839.10 for the calendar year 1949 and interest on said sum; that said deficiency resulted from the inclusion in plaintiffs' taxable income as ordinary income the profit received from the cutting and sale of standing timber, which standing timber plaintiff had had an exclusive right to cut for more than six months prior to the time they commenced to log the same.

4. On the 11th day of December, 1953, plaintiffs paid to the defendant a sum sufficient to cover the asserted 1949 deficiency of \$11,839.10 plus interest thereon to the date of said payment.

5. On February 24, 1954, plaintiffs filed a refund claim for the 1949 deficiency paid on December 11, 1953, plus interest, which refund claim sets forth the reasons why refund should be granted; a substantial copy of said refund claim is hereto attached as Exhibit I and is incorporated herein by reference.

6. More than six months have elapsed since the filing of said refund claim on February 24, 1954, but defendant has refunded no part thereof, and all conditions precedent to defendant's duty to refund said overpayment and interest have been performed and have occurred.

7. Plaintiffs demand trial by jury of all issues in this action.

Wherefore, plaintiffs demand judgment against defendant for \$14,505.33 being \$11,839.10 in principal and \$2,666.23 in interest paid by plaintiffs on 1949 deficiency, or whatever sum is due plaintiffs, plus interest thereon at the rate of 6% per annum from December 11, 1953 until paid together with plaintiffs' costs of suit herein.

/s/ WILLIAM F. HENNESSEY

JOHN L. FLYNN

HUGH B. COLLINS

Attorneys for Plaintiff

[Endorsed]: Filed Sept. 2, 1954.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant, William E. Frank, District Director of Internal Revenue for the State of Washington and the Territory of Alaska, by his attorneys, Charles P. Moriarty, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service, and in answer to the plaintiffs' complaint herein:

I.

Denies the allegations contained in said complaint not admitted, qualified or specifically referred to below.

II.

Further answering plaintiffs' complaint:

1. Denies the allegations contained in paragraph 1 of the complaint but admits that this purports to be an action for the recovery of internal revenue taxes; admits that the defendant has been the District Director of Internal Revenue for the State of Washington and the Territory of Alaska from October 31, 1952 to the present time; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations that the plaintiffs were husband and wife, citizens and residents of the State of Washington or citizens of the United States.

2. Denies the allegations contained in paragraph 2 of the complaint but admits that on or about March 15, 1950, the plaintiffs filed their income tax return on Form 1040 for the calendar year 1949, prepared on a cash receipts and disbursements basis and the income tax liability disclosed on said return has been paid.

3. Denies the allegations contained in paragraph 3 of the complaint but admits that an internal revenue agent made an examination of plaintiffs income tax return for the year 1949 and in a letter dated February 16, 1953 (Form 1200) addressed to plaintiffs, the defendant enclosed a copy of the report of examination dated November 28, 1952, which proposed a deficiency of \$11,839.10; that the Commissioner of Internal Revenue assessed against the plaintiffs a deficiency in income tax in the sum

of \$11,839.10 for the calendar year 1949, together with interest; that said deficiency resulted from the inclusion in plaintiffs' taxable income as ordinary income the profit received from the cutting and sale of standing timber.

4. Denies the allegations contained in paragraph 4 of the complaint but admits that the taxpayer paid the deficiency assessed for the year 1949 in the amount of \$11,839.10 in tax and \$2,661.04 in interest, a total of \$14,500.14 subsequent to December 24, 1953.

5. Denies the allegations contained in paragraph 5 of the complaint but admits that on February 24, 1954, the plaintiffs filed a claim for refund for the year 1949 and that a copy of the said refund claim is attached to the complaint as Exhibit I but denies the substantive allegations contained in the said claim for refund.

6. Denies the allegations contained in paragraph 6 of the complaint but admits that more than six months have elapsed since the filing of the said claim for refund and that no part of the amount so claimed has been refunded to the plaintiffs.

First Affirmative Defense

The plaintiffs are limited to a recovery, if any, which is based upon the decision of this Court that the income received from the sale of certain timber is reportable by the plaintiffs as capital gain and not as ordinary income since no other issue is raised by the claim for refund or the complaint.

Wherefore, the defendant prays that the plain-

tiffs' complaint be dismissed and defendant be allowed his costs and disbursements.

/s/ CHARLES P. MORIARTY

United States Attorney

/s/ THOMAS R. WINTER

Special Assistant to the Regional

Counsel, Internal Revenue Service

Acknowledgment of Service Attached.

[Endorsed]: Filed July 26, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION

To the above named defendant and his attorneys of record:

Plaintiffs request defendant within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial:

1. That during the year 1948 and prior to the removal of any timber involved in this litigation, Robert F. Ellison expended \$174,031.06 as listed below for the sole purpose of enabling him to harvest such timber:

Construction of permanent roads	\$76,578.06
Road machinery and dump trucks	17,806.57
Logging trucks and trailers	42,504.08
Logging equipment	29,346.10
Repair and service truck and miscellaneous equipment	7,796.25

2. Neither Northwest Door Company nor Van-

couver Plywood Corporation claimed capital gain on the removal or on the sale of any timber involved in this action.

3. United States Department of Agriculture Forest Service Contract A6 fs-16060 was performed and discharged by performance prior to February 16, 1953.

4. On December 11, 1953, plaintiffs paid to defendant \$11,839.10 as the amount of the deficiency referred to in paragraph 7 of the agreed facts, and \$2,661.04 as interest thereon.

5. During the calendar years 1947 through 1949, inclusive, Robert F. Ellison was self-employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest.

6. The Treasury Department does not deny capital gains treatment to the purchasers of timber from any federal or state agency including the Department of Agriculture where the purchaser cuts, sells, or uses said timber after having held the purchase contract for more than 6 months prior to the beginning of the taxable year in which the timber is utilized or sold.

7. That Northwest Door Company loaned Robert F. Ellison \$100,000.00 for the purpose of enabling him to cut and remove timber from the said tract.

8. If Robert F. Ellison had a contract right to cut said timber for sale or use in his business (and we do not ask that you admit that he had such

right) he owned said right for more than 6 months prior to the commencement of the tax year in which he cut the timber.

9. If Robert F. Ellison owned said timber (and we do not ask that you admit such ownership) he owned it for more than 6 months prior to the commencement of the tax year in which it was cut.

10. If Robert F. Ellison owned an economic interest in said timber (and we do not ask you to admit that he owned such interest) he owned such economic interest for more than 6 months before the beginning of the tax year in which the timber was cut.

11. Any right, title or interest whatever that Robert F. Ellison owned in said timber was owned by him for more than 6 months prior to the commencement of the tax year in which the timber was cut.

Dated this 6th day of March, 1956.

/s/ JOHN L. FLYNN

Attorney for Plaintiffs

Acknowledgment of Service Attached.

[Endorsed]: Filed March 7, 1956.

[Title of District Court and Cause.]

REPLY TO REQUEST FOR ADMISSIONS

State of Washington

County of King—ss.

William E. Frank, first being duly sworn, deposes and says:

1. I am the defendant in the above-entitled action.

2. I have carefully read the request for admissions served upon my counsel by plaintiffs on March 7, 1956.

3. I cannot truthfully admit or deny the matters stated in paragraphs 1 and 7 thereof, because those matters are not within my knowledge.

4. Paragraph 4 thereof is denied, because the payment made by plaintiffs to me on December 11, 1953, included other taxes besides those referred to in paragraph 7 of the agreed facts. A portion of this payment of taxes for 1949 related to a disallowance of claimed deductions in the total amount of \$478.00.

5. Paragraph 5 thereof is specifically denied.

6. Paragraphs 8-11 thereof are specifically denied, except that it is admitted that whatever interest Robert F. Ellison may have had in the timber under Contract A6-fs-16060 dated from December 9, 1947.

/s/ WILLIAM E. FRANK

Subscribed and sworn to before me this 13th day of March, 1956.

[Seal] /s/ C. W. CATHEY

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore had, whereat the plaintiffs were represented by William F. Hennessey, John L. Flynn, and Hugh B. Collins, and the defendant by Charles P. Moriarty, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service, their attorneys of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

1.

That Robert F. Ellison and Cleo A. (Ellison) Walker were husband and wife, citizens and residents of the State of Washington during the calendar year 1949, and that they were during that year and are now citizens of the United States.

2.

That Robert F. Ellison and Cleo A. (Ellison) Walker during the year 1949 filed a joint Federal income tax return with the District Director of Internal Revenue at Tacoma, Washington, and that they made payment of Federal income taxes for the year 1949 in the amount of \$6,685.98 to said District Director prior to the due date of said return. Cleo A. (Ellison) Walker is involved in this case solely because of the filing of a joint income tax

return. Robert F. Ellison and Cleo A. (Ellison) Walker are referred to hereinafter as "taxpayers." A true copy of the taxpayers' joint return is attached as Pretrial Exhibit 1.

3.

That on or about September 4, 1947, the Northwest Door Company, a Washington corporation, entered into what is designated as a timber sale agreement with the United States Department of Agriculture Forest Service, said contract being on Form 202, Rev. June, 1942, and numbered A6 fs-16060, a copy of which contract and related documents is attached as Pretrial Exhibit 2.

4.

That on or about December 9, 1947, the Northwest Door Company, a Washington corporation, and the Vancouver Plywood Corporation, a Washington corporation, entered into an agreement with Robert F. Ellison. A true copy of said agreement is attached as Pretrial Exhibit 3.

5.

That during the year 1949 the plaintiffs removed 15,612.901 feet (board measure) of timber from the property covered in the timber sale agreement (Pretrial Exhibit 2) herein; that the plaintiffs reported capital gains in the amount of \$50,380.06 as derived from the cutting of said timber on their Federal income tax return for the calendar year 1949; that the said taxpayers paid the Federal income taxes on gains from the cutting of the timber at the rates applicable to capital gains for the cal-

endar year 1949; that the said taxes were paid to the District Director of Internal Revenue at Tacoma, Washington.

6.

That an internal revenue agent made an examination of the Federal income tax return for the calendar year 1949 filed by the plaintiffs; that the report of the revenue agent asserted a deficiency of income tax for the calendar year 1949 in the amount of \$11,839.10, which was based on the inclusion of \$50,380.06 as ordinary income derived from the contract with the Northwest Door Company and Vancouver Plywood Corporation dated December 9, 1947, instead of a long-term capital gain under Sec. 117 (k) of the Internal Revenue Code, as reported by the taxpayers.

7.

That on December 24, 1953, the Commissioner of Internal Revenue assessed a deficiency in income tax of \$11,839.10 and interest of \$2,661.04 against the taxpayers; this deficiency resulted in its contested part from the inclusion in income of the taxpayers for 1949 of \$50,380.06 as ordinary income derived from the contract with the Mutual Door Company and Vancouver Plywood Corporation dated December 9, 1947, instead of a long-term capital gain under Sec. 117 (k) of the Internal Revenue Code, as reported by the taxpayers on their 1949 joint income tax return. That on December 10, 1953, the taxpayers remitted to the District Director of Internal Revenue at Tacoma,

Washington, an amount in excess of the deficiency assessed for the year 1949, which amount was recorded in a suspense account, No. 9-B-5414, and subsequently credited to the taxpayers' account in payment of their liability for the deficiency assessed on December 24, 1953.

8.

That the taxpayers filed a claim for refund for the calendar year 1949; that the Director of Internal Revenue has neither communicated with the taxpayers nor has he accepted or rejected the said refund claim; that more than six months have elapsed since the filing of the said claim for refund and that no part thereof has been refunded to the taxpayers.

Plaintiffs' Contentions

1.

On December 11, 1953, plaintiffs paid to defendant \$11,839.10 as the amount of the deficiency referred to in paragraph 7 of the agreed facts, and \$2,661.04 as interest thereon.

2.

During the calendar years 1947 through 1949, inclusive, Robert F. Ellison was self employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest.

3.

Said timber referred to in paragraph 5 of the agreed facts was removed by Robert F. Ellison and sold by him in the course of his business.

4.

Robert F. Ellison had a contract right to cut said timber for sale or use in his business, and he owned said right for more than 6 months before the beginning of the taxable year in which he cut the timber.

5.

Robert F. Ellison owned said timber at the time he cut it, and owned it for more than 6 months before the beginning of the taxable year in which he cut the timber.

6.

Robert F. Ellison owned an economic interest in said timber at the time he cut it, and owned such economic interest for more than 6 months before the beginning of the taxable year in which he cut the timber.

Defendant's Contentions

1.

That the contract of December 11, 1947, between Robert F. Ellison and Northwest Door Company and Vancouver Plywood Corporation was a contract of employment by the corporations of Robert F. Ellison as a logger who was entitled only to compensation for his services measured by the market value of the logs.

2.

That Robert F. Ellison was not the owner of a contract right to cut the timber contained on the tract purchased by Northwest Door Company and

Vancouver Plywood Corporation from the United States Department of Agriculture.

3.

That Robert F. Ellison was not entitled to the benefits of Section 117(k)(1) I.R.C. (1939) as claimed on timber removed by him during the year 1949.

Issues of Law

1.

The plaintiffs contend that the following is the issue before the court:

Whether plaintiffs were entitled on their said income tax return to report any gain realized on the removal or on the sale of said timber as capital gain, and to be taxed thereon only at the capital gains rate.

2.

The defendant contends that the following is the issue before the court:

Whether the performance of the contract dated December 9, 1947 (Pretrial Exhibit 3) between Robert F. Ellison, Northwest Door Company, and Vancouver Plywood Corporation was sufficient to establish for the purpose of Section 117 (k)(1) of the Internal Revenue Code of 1939 that timber was cut (for sale or for use in the taxpayers' trade or business) during 1949 by Robert F. Ellison and whether he owned or had such contract right to cut such timber for a period of more than 6 months prior to January 1, 1949.

Exhibits

The exhibits of all parties below listed were produced and marked, and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. Each party waives the objection that any such exhibit is a copy rather than the original.

1. Plaintiffs' income tax return for 1949.

2. United States Department of Agriculture Forest Service contract A6 fs-16060 and related documents.

3. Contract dated December 9, 1947, executed by Robert F. Ellison, Northwest Door Company, and Vancouver Plywood Corporation.

4. Claim for refund of income taxes for 1949 filed by plaintiffs. Attached to complaint.

5. Statutory notice of deficiency, year 1949.

6. Minutes of meeting October 24, 1947, Vancouver Plywood Corporation; present: J. Power, C. Hovey, H. E. Tenzler, and Geo. Raknes, re contract with Robert F. Ellison.

7. Memo of August 4, 1948, from Geo. Raknes to H. E. Tenzler.

8. Northwest Door Company's ledger account with Robert F. Ellison.

9. Two Northwest Door Company disbursement vouchers dated March 10 and October 25, 1949, and settlement sheet dated March 9, 1949.

10. Plaintiffs' 1947 income tax return. Separate returns.

11. Plaintiffs' 1948 income tax return. Separate returns.

12. Robert F. Ellison's account books for 1947 through 1949, and records for 1949.

13. [Cancelled.]

14. Exoneration of bond which is a part of Exhibit 2.

Action By The Court

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated at Tacoma, Washington, this 15th day of March, 1956.

/s/ GEO. H. BOLDT

United States District Judge

Form Approved:

/s/ WILLIAM F. HENNESSEY

Attorney for Plaintiffs

CHARLES P. MORIARTY

/s/ By K. W. MELCHIOR

Attorney for Defendant

[Endorsed]: Filed March 15, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before the Court at Tacoma, Washington, on March 15 and 16, 1956. Plaintiff's were represented by John L. Flynn and Hugu B. Collins, Esqs., and defendant was represented by Charles P. Moriarty, Esq., United States Attorney, Guy A. B. Dovell, Esq., Assistant United States Attorney, and Kurt W. Melchior and Theodore D. Taubeneck, Esqs., Attorneys, Department of Justice, Washington 25, D. C.

The Court, having considered the evidence and exhibits adduced by the parties and the arguments of counsel, being fully advised in the premises, and having heretofore rendered an oral opinion, now finds the facts herein and states its Conclusions of Law, as follows:

Findings of Fact

1. Plaintiffs were, at the times material hereto, husband and wife, residing in the State of Washington. As such they filed their joint income tax return for the year 1949 with the Collector of Internal Revenue for the District of Washington and paid the tax shown thereon to be due.

2. Thereafter the Commissioner of Internal Revenue caused an examination of this return to be made, and upon audit assessed a deficiency in income taxes for the year 1949 against plaintiffs in the amount of \$11,839.10, with interest, all of which

plaintiffs paid to the defendant on or about December 10, 1953. Defendant then was and now is the District Director of Internal Revenue for the District of Washington, with residence in this judicial District.

3. Thereafter plaintiffs filed a timely claim for refund of said deficiency payment, and more than six months later they commenced this action to recover such taxes.

4. In 1947, the United States, through the Forest Service of the Department of Agriculture, owned the fee to certain timber lands on the Green Fork River in what is now the Gifford Pinchot National Forest, in the State of Washington. The Forest Service was then in the process of offering to sell the timber on said tract to the public under a pay-as-cut contract, providing for payment for the timber as it was cut.

5. Theodore Franklin Wall, an employee of Northwest Door Company, in 1947 had the duty of procuring logs for that company. Plaintiff Ellison was a logger. Wall heard of the probable sale of the Green Fork timber by the Forest Service; he also knew of Ellison's interest in logging operations. Wall therefore induced Ellison to inspect the Green Forks tract with him. Wall's purpose was to obtain a supply of logs for his employer, Northwest Door Company. As a result of these preliminaries, Northwest Door Company became interested in obtaining the logs off the Green Forks timber, and Ellison in conducting the logging operations.

6. The Forest Service awarded the Green Forks timber and the contract right to cut that timber to Northwest Door Company by Contract Form 202, No. A6 fs-16060. This contract by its terms provided that Northwest Door would purchase, cut and pay for the timber from the Green Forks tract. Title to the timber remained in the United States until after the timber had been felled, scaled, paid for, etc., and then passed to Northwest Door Company. Northwest Door Company was financially liable to the United States for performance of the contract.

7. Ellison is not mentioned in Contract A6 fs-16060. Neither title to the timber nor the contract right to cut the timber ever lay in Ellison.

8. Northwest Door Company was interested in the Green Forks timber for its plywood operations rather than for any profit from the logging. Ellison became a contract logger for Northwest Door Company on the Green Forks tract, and received large advances of operating funds from Northwest Door Company in that connection. Northwest Door Company and Ellison entered into a contract, drafted by an able and experienced attorney, which provided in part as follows:

(a) Northwest Door Company was described as the Owner of the timber;

(b) Ellison was described as a logger;

(c) Ellison agreed to "fall, buck, yard, load and transport to navigable water * * * all of the timber" on the Green Forks tract;

(d) Ellison agreed to assume certain of the costs of the logging;

(e) Ellison undertook to perform all conditions required of Northwest Door Company under the Forest Service contract, and to keep that company harmless from all claims in connection with his logging operations;

(f) All logs, timber and forest products on the Green Forks tract were to remain the property of Northwest Door Company and another company, and Ellison was to have no right, title or interest therein other than the right to receive his compensation under the contract;

(g) Ellison was to be paid the Columbia River market price of the logs for his logging services, in full payment and discharge of Northwest's obligations to him;

(h) Northwest Door Company was to advance reasonable amounts of operating capital to Ellison, for which it could withhold portions of the sums due Ellison under (g) above.

9. The foregoing contract was drafted after a full exploration of the situation by all concerned, and reflected the intentions of the parties precisely. Its provisions are clear and unambiguous. If the contract be subject to parol construction, then the evidence fully shows that the contract meant what it said.

10. Ellison had no right, title or interest in the timber at any time. He was to perform the service of logging the timber for Northwest Door Company

and was to be paid for his services only. The payment was to be measured by the market value of the logs. Title to the timber lay at all pertinent times only in the United States and in Northwest Door Company, but not in Ellison.

11. Taxpayers bore the economic risk of the logging operations on the Green Forks tract, but in the absence of any right, title or interest in the timber on their part that fact is not relevant. Neither is it material that Northwest Door Company, which was not interested in economic gain on the logging operation and wanted only the logs at their Columbia River market price, had no gain or loss on the logging operation and therefore did not claim any capital gain thereon.

12. Ellison's logging contract had extended over a period in excess of six months when he received payments for logging services from the Northwest Door Company in 1949, and plaintiffs reported the excess of these payments over their costs on their 1949 income tax return as capital gain from the cutting of timber they owned or had a contract right to cut, for use in their own business or for sale. The Commissioner of Internal Revenue held that Ellison did not own the timber, nor was he buying it under a contract right to cut the timber, nor did he cut it for sale or for use in his own business, and that therefore the proceeds from his logging operations were taxable to the taxpayers as ordinary income. It is this determination which gave rise to the present dispute.

13. The present taxpayers did not at any time own or have a contract right to cut the Green Forks timber, nor did they cut said timber for use in their own business or for resale. The Commissioner correctly determined that the gain from Ellison's logging operations was taxable to the taxpayers as ordinary income. Taxpayers did not overpay any tax and are entitled to no recovery.

14. During the calendar years 1947 through 1949, inclusive, Robert F. Ellison was self-employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest.

Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter of this action.

2. A logger who has or obtains no right, title or interest in the timber which he cuts may not elect to report the gain from his logging operations as capital gain under Sections 117(k)(1) or 117(k)(2) of the Internal Revenue Code of 1939, 26 U.S.C. Sec. 117 (1952 ed.). *Carlen v. Commissioner*, 220 F. 2d 338 (C.A. 9th). In that connection it is not material whether the contract logger assumes all or any part of the economic risk of the logging operation. A taxpayer must have an interest in the nature of title in the timber in order to avail himself of the election provided by that statute.

3. The defendant acted properly and lawfully in collecting the taxes complained of herein.

4. Plaintiffs are not entitled to any recovery from the defendant. The defendant is entitled to a judgment of dismissal of this action with prejudice.

Done in open Court this 22nd day of June, 1956.

/s/ GEO. H. BOLDT,

United States District Judge

Presented by:

/s/ GUY A. B. DOVELL,

Assistant United States Attorney

Approval restricted to form only:

/s/ HUGH B. COLLINS,

Of Counsel for Plaintiffs

[Endorsed]: Filed June 22, 1956.

United States District Court, Western District
of Washington, Southern Division

Civil No. 1938

ROBERT E. ELLISON and CLEO A. (ELLI-
SON) WALKER, Plaintiffs,

v.

WILLIAM E. FRANK, UNITED STATES DIS-
TRICT DIRECTOR OF INTERNAL REV-
ENUE FOR THE STATE OF WASHING-
TON and THE TERRITORY OF ALASKA,
Defendant.

JUDGMENT

The Court having considered the evidence and the arguments of counsel and entered its Findings of

Fact and Conclusions of Law herein, it is in conformity therewith

Ordered, Adjudged and Decreed that the plaintiffs take nothing from the defendant, and that their action be and it hereby is dismissed with prejudice, and that the defendant have and recover his costs herein from the plaintiffs.

Done in open Court this 22nd day of June, 1956.

/s/ GEO. H. BOLDT,

United States District Judge

Presented and approved by:

/s/ GUY A. B. DOVELL,

Assistant United States Attorney

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William E. Frank, United States District Director of Internal Revenue for the State of Washington and the Territory of Alaska, Defendant herein, and to; Thomas R. Winter, Assistant Regional Counsel, Internal Revenue Service, and to: Charles P. Moriarty, United States Attorney, Attorneys for the Defendant:

Notice Is Hereby Given that Robert F. Ellison and Cleo A. (Ellison) Walker, plaintiffs above named, appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein on the twenty-second day of June, 1956, by the United States District Court,

Western District of Washington, Southern Division, in favor of the Defendant and against the Plaintiffs.

Dated August 15, 1956.

/s/ JOHN L. FLYNN,

Attorney for Appellants

Affidavit of Service Attached.

[Endorsed]: Filed Aug. 18, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS

In their appeal herein, the appellants intend to rely on the following points:

1. The Court erred in failing to find that certain timber contained on what is referred to in these proceedings as the Green Forks Tract, subject to contract between Northwest Door Company and Robert F. Ellison was removed by Robert F. Ellison and sold by him in the course of his business.

2. The Court erred in failing to find that Robert F. Ellison had a contract right to cut said timber for sale or use in his business, and that he owned said right for more than six months before the beginning of the tax year in which he cut the timber.

3. The Court erred in failing to find that Robert F. Ellison owned said timber at the time he cut it, and owned it for more than six months before the beginning of the tax year in which he cut the timber.

4. The Court erred in failing to find that Robert F. Ellison owned an economic interest in said timber at the time he cut it, and owned such economic interest for more than six months before the beginning of the tax year in which he cut the timber.

5. The Court erred in failing to find that Robert F. Ellison was the beneficiary of the contract, Exhibit 2, made between Northwest Door Company and the United States Department of Agriculture for the removal of timber referred to in these proceedings as the "Green Forks Tract" and that the said Robert F. Ellison was at all times material herein the owner of equitable title to the timber and logs obtained therefrom.

6. The Court erred in failing to find that the plaintiffs are entitled to recovery of not less than the sum of \$11,361.10 from the defendant.

7. The Court erred in dismissing this action with prejudice.

8. The Court erred in ordering judgment in favor of the defendant and against the plaintiffs.

/s/ JOHN L. FLYNN,
Attorney for Appellant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 18, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10 as amended of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers, pleadings and exhibits in the above entitled cause as are designated by the written Designations of the parties hereto, and that the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above entitled Court, filed and entered on June 22, 1956, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Complaint (exhibit omitted) Filed Sept. 2, 1954)
2. Amended Answer (filed July 26, 1955)
3. Plaintiffs' Request for Admissions (filed Mar. 7, 1956)
4. Defendant's Reply to Request for Admissions (filed Mar. 14, 1956)
5. Pretrial Order (filed and entered Mar. 15, 1956)

6. Reporter's Transcript of Proceedings of 6/22/56 (filed 6/27/56)

7. Findings of Fact and Conclusions of Law (filed and entered June 22, 1956)

8. Judgment (filed and entered June 22, 1956)

9. Plaintiffs' Notice of Appeal (filed Aug. 18, 1956)

10. Statement of Points (filed Aug. 18, 1956)

11. Plaintiffs' Designation of Contents of Record on Appeal (filed Aug. 18, 1956)

12. Defendant's Designation of Additional Contents of Record on Appeal (filed Aug. 30, 1956)

13. Affidavit of Service of Defendant's Designation (filed Aug. 30, 1956)

14. Reporter's Transcript of Proceedings (of Mar. 15 and 16, 1956—in 2 volumes) (filed Mar. 24, 1956)

I further certify that as part of the Record on Appeal I am transmitting herewith the following exhibits admitted in evidence in the trial of the above entitled cause, to-wit:

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8 & 9, and Defendant's Exhibit A.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto in the preparation of the Record on Appeal in said cause, to-wit: Notice of Appeal, Plaintiffs: \$5.00, and that the said fee of \$5.00 has been paid to the Clerk by the Plaintiffs.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

United States of America,
Western District of Washington—ss.

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Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8 & 9, and Defendant's Exhibit A.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto in the preparation of the Record on Appeal in said cause, to-wit: Notice of Appeal, Plaintiffs: \$5.00, and that the said fee of \$5.00 has been paid to the Clerk by the Plaintiffs.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Tacoma, Washington, this 24th day of September, 1956.

[Seal] MILLARD P. THOMAS,

Clerk,

/s/ By E. E. REDMAYNE,

Deputy

In the District Court of the United States for the
Western District of Washington,
Southern Division

No. 1938

ROBERT F. ELLISON and CLEO A. (ELLISON) WALKER,
Plaintiffs,

VS.

WILLIAM E. FRANK, UNITED STATES DISTRICT DIRECTOR OF BUREAU OF INTERNAL REVENUE, STATE OF WASHINGTON, TERRITORY OF ALASKA,
Defendant.

TRANSCRIPT OF PROCEEDINGS

in the above-entitled and numbered cause had before the Honorable George H. Boldt, United States District Judge, on the 15th and 16th days of March, 1956, Federal Building, Tacoma, Washington.*

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Appearances: John L. Flynn, Esq., 613 United States National Bank Building, Portland, Oregon; and Hugh B. Collins, Esq., 107 E. Main Street, Medford Oregon, appeared on behalf of the Plaintiffs.

Thomas R. Winter, Esq., Assistant Regional Counsel, Internal Revenue Service, United States Courthouse, Seattle, Washington; and Kurt W. Melchior, Esq., Attorney, Tax Division, Department of Justice, Washington, D. C.; and T. D. Taubeneck, Esq., Attorney, Tax Division, Department of Justice, Washington, D. C., appeared on behalf of the Defendant.

Proceedings

(Plaintiffs' Exhibits Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14 marked for identification prior to trial.)

Mr. Collins: Before making the opening statement there is one matter that counsel for both sides would like to call to the Court's attention. On the 7th day of this month certain requests for admissions of facts were served by the plaintiffs upon the defendant and the defendant responded to these but there was one request, number three, that was not either admitted or denied.

Counsel informs me that it was his intention to admit it by failure to deny it. Yet it will not become admitted by option of law until the 17th of this month since the ten-day period will not be up. And Mr. Melchior has very kindly consented

he will stipulate that the plaintiffs' request for admission number three is admitted.

Mr. Melchior: That is correct, your Honor.

The Court: Thank you.

Mr. Melchior: Well, while we are on that point, although it may be a little preliminary, we made certain partial admissions in our response and although the ten days have not yet expired and will not have expired, as I assume, when this case is submitted, such admissions as [1] are contained in that request I think the Plaintiffs may rely on in so far as the defendant is concerned.

The Court: Thank you.

Mr. Collins: In addition to that, there has been an objection interposed to one of the requests for admission but we may not ever come to that point, so we are not going to ask your Honor to rule on it until we do.

The Court: Very good rule to follow. Got enough problems to solve.

Mr. Collins: Briefly, what this case is about, what the Plaintiff proposes to prove is certain timber was purchased from the Department of Agriculture Forest Service; that the Plaintiff became the owner of the timber. I use it not in the strict sense of legal title, but in the sense ownership is generally understood. And that he held such ownership for more than six months prior to the commencement of the tax year in which he thereafter removed timber.

The defendant admits that any interest he had, if he had an interest, was so held for more than six

months. So this case essentially reduces itself to this proposition: What was the plaintiff's interest in this timber, and we propose to show ownership as it is commonly understood by the man on the street without regard to the niceties of legal title. And aside from that I feel that the agreed [2] facts contained in the pretrial order pretty well sum up the case and such features as I have not dwelt upon in this opening statement will be adequately covered by the witnesses so that there will be no confusion or doubt as the story unrolls.

Mr. Melchior: If your Honor please, from the Government's point of view, this case is even simpler than that.

The Court: I am always concerned when everybody agrees it is a simple case. It usually turns out to be the "stinger."

Mr. Melchior: Yesterday we had some problems that were fairly subtle but today I think that since this controversy arose between the parties the Court of Appeals for this circuit has effectively foreclosed plaintiffs. Yesterday I guess the defendant was somewhat in that position, but today the Court of Appeals has foreclosed plaintiffs from much further contention. The case which we believe is completely on all fours with the situation created by the documents in this case was before the Court of Appeals in *Carlen vs. Commissioner*, 220 Fed. (2d), 338. I sent the citation into your chambers this morning.

The Court: Thank you. I haven't had an opportunity to look at it.

Mr. Melchior: And that case, of course, was [3]

decided after this controversy arose, but there is no question in our minds that the situation is entirely the same. Listening to Mr. Collins just now, I think that probably the issue is quite narrow. We must recognize the effect of the Carlen case and in order to come within the ruling of that case they have got to show that ownership in the sense of title lies in them. And the statement was made a moment ago that they are going to show ownership, without reference to the niceties of legal title, is going to lie in them. I don't think they can do it, but I think moreover they are foreclosed from trying it because title and all of the rights of the parties are established in writing and there isn't any occasion for any testimony to construe. That is our position.

The Court: Yes, very well, go ahead.

Mr. Collins: The plaintiff will call the first witness, Mr. Tenzler. [4]

H. E. TENZLER

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs, and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: H. E. Tenzler, T-e-n-z-l-e-r.

Q. What is your occupation, Mr. Tenzler?

A. I am President of Northwest Door Company, Tacoma, Washington.

(Testimony of H. E. Tenzler.)

Q. Were you connected with Northwest Door Company during 1947?

A. Yes, I was President and General Manager at that time.

Q. And have you continued to head the company from 1947 to the present time?

A. Yes, I have.

Q. Now generally, what type of product does Northwest Door Company manufacture?

A. Northwest Door Company manufactures plywood, fir plywood and fir doors.

Q. Now in the course of the manufacturing operations do they use all kinds of logs or are their requirements generally speaking limited to what is called peelers? [5]

A. The fir plywood division of our company requires a higher type of log which, as you say, is the peeler type, the better grades.

Q. Now, did Northwest Door Company do any logging during the year 1947?

A. In 1947 Northwest Door did not do any logging.

Q. Where did Northwest Door Company at that time acquire the majority of the logs that were used?

A. In 1947 we procured virtually all of our logs on the open market.

Q. Did Northwest Door Company ever buy timber from loggers in 1947 and prior years?

A. Yes, we did.

(Testimony of H. E. Tenzler.)

Q. Now, how were these timber purchases generally handled?

The company would assist the loggers to obtain the timber and in return would make a contract with the loggers, would sell the timber to the loggers and in return would have an agreement with the loggers to sell the logs to the company at the prevailing market prices.

Q. How did Northwest Door Company secure repayment of advances to themselves and secure that the logger would carry out his undertaking to sell the logs back to Northwest Door Company?

A. To protect our advances and other interests?

Q. Yes.

A. We would have written contracts and agreements to that effect.

Q. Who determines just exactly what wording was to go into the contracts?

A. The company counsel took care of our interests in that matter.

Q. And in 1947 who was the company counsel?

A. Mr. Eisenhower.

Q. Did Northwest Door Company retain any rights or interest in these stands of timber after turning them over to the loggers?

A. Rights that we retained were to protect our interests, the money we may have advanced, and to see to it that there was a proper performance, contract on which the company may be involved and the right to purchase the logs from the logger at prevailing market prices or to have the first

(Testimony of H. E. Tenzler.)

privilege of purchasing the logs at prevailing market prices.

Mr. Melchior: May I have that answer read?

(Whereupon, the reporter read back the last answer.)

Q. Now for the purposes of this next question, Mr. Tenzler, I am going to refer to a transaction by a short name. I will call it the Green Forks timber transaction. [7]

The Court: Green Forks?

Mr. Collins: Green Forks timber transaction.

Q. (Continuing) Are you in a general way familiar with that transaction? A. Yes, I am.

Q. And was Mr. Ellison involved in the Green Forks transaction? A. Yes, he was.

Q. Now you have testified concerning the general policy adopted by Northwest Door Company in financing these loggers. What is this general policy followed by your company in connection with the Green Forks transaction?

Mr. Melchior: I object. I think that he should prove his specific instruments before he gets down to any question of conforming general policy to transaction.

The Court: I think perhaps the objection is well taken. If this was evidenced by some written instrument the instrument itself should be presented before any parol explanation of its effect.

Mr. Collins: Well, your Honor, I think it might as well come out at this time, as you observed, the simplifications get difficult. It appears from the

(Testimony of H. E. Tenzler.)

agreed facts that certain written instruments were entered into in connection with this transaction, but it is our contention based upon the Washington cases, principally Winstrom vs. [8] Ransom that the defendant not being a party to these instruments is in no position to object to the parol evidence rule being——

The Court: Well, let me shorten it down to this effect, that I am going to permit you, in view of the fact this is a non-jury matter, to make a full record on your position whatever it may be. But I think it is incumbent upon the adverse party to make its objection. Now if you want leave to make a record on the thing, preserving to the Government its objection to this type of proof, it is agreeable to me to proceed in that manner and it might save time.

Mr. Collins: Entirely satisfactory.

Mr. Melchior: I appreciate this question of making a complete record, your Honor. I still insist on pressing my objection that even with respect to the preservation of the record I think the contract should be in evidence first before there is any examination attempting to interpret it.

The Court: Well I must say that I am rather inclined to that view. Do you have some authority to the contrary?

Mr. Collins: Well, your Honor——

The Court: Or if you show there was no written instrument or something of that kind, but if there was one [9] I think that we have got to start from the written instrument and work from there. At

(Testimony of H. E. Tenzler.)

least that has been my previous understanding of the rule. I could be in error, as I often am.

Mr. Collins: I think it resolves itself to this, your Honor. It is a question of order of proof and at the time the case has been completed and you look back over at what has transpired, then you are going to find that certain things were in evidence or somebody has failed to make his case. However, I think the order in which they come in is subject to the Court's discretion and largely up to the party who is putting on the case even though it may inconvenience his adversary.

The Court: Well of course I am not concerned about the matter of conveniencing or inconveniencing. All I have got to do is rule on such objections that are made and the objection is made that this was apparently covered by a written instrument at least to some effect or other. Now I think standard procedure requires that the document be produced and examined first. That is my impression of it. However, I don't see how in the world anybody can be harmed by having it out here if there was such a document. It is eventually going to come into the record one way or the other and aren't we just bothering about something that is not very important? [10]

Mr. Melchior: If your Honor please, it is identified and the formal objections to the contract are disposed of because it is Exhibit 3 to the pretrial order.

The Court: Has it been admitted in evidence?

(Testimony of H. E. Tenzler.)

Mr. Melchior: No, there are no—none of the exhibits in the pretrial order have been admitted.

The Court: Apparently all we have to do is admit the exhibits which are attached to the pretrial order and we will have accomplished the thing that your objection at the moment calls for.

Mr. Melchior: That is my only objection at the moment. I am not going to agree to the admission of all of these exhibits. As far as the pre-trial order is concerned they have been identified only and the formal objections have been waived, but there are, of course, substantive objections to some of them, none to this particular exhibit.

The Court: All right, what about it? Do you want to move for the admission of the exhibits now at this time and resolve this particular matter in that way?

Mr. Collins: Well, I feel it can do no harm, your Honor.

The Court: All right, let's do it that way. The contract is Exhibit—

Mr. Collins: Exhibit 3. [11]

The Court: —Exhibit 3. Where is that? Is that physically attached to the pretrial?

The Clerk: No, your Honor.

The Court: All right, is there any objection to the admission of Exhibit 3?

Mr. Melchior: No, your Honor.

The Court: If not, it is admitted. All right, that answers your immediate objection. All right, go ahead, Mr. Collins.

(Testimony of H. E. Tenzler.)

(Plaintiffs' Exhibit No. 3 admitted in evidence.)

[See pages 127-133.]

(Whereupon, the Reporter read back the last question.)

Mr. Melchior: I now object further on the ground the contract in evidence speaks for itself.

The Court: Your objection is noted and overruled. Go ahead.

Q. (Continuing) You may answer the question, Mr. Tenzler. Would you like to have it read back again? A. Yes.

(Whereupon, the Reporter again read back the last question.)

A. (Continuing) It was.

Q. Now was Mr. Ellison the logger that was financed in this manner by you on the Green Forks transaction? [12] A. He was.

Mr. Melchior: I don't think the witness should be lead on this point because this——

The Court: I am not going to give any weight to the leading. I mean that is not any concern and in this manner I understand the objection is probably to the form of the question but I think we needn't concern ourselves about that.

Mr. Melchior: It really goes to the substance of what the—I want to make a formal objection. The reason for my objection, if I may explain, is this, that as I explained in the opening statement the Government's position is based on the documents in the case. If there is going to be any deviation from

(Testimony of H. E. Tenzler.)

the documents attempted to be introduced on the part of the Plaintiff, I think it is very important that the witnesses rather than counsel describe what that deviation is.

The Court: Well, there isn't any question about that, but I think this is by way of preliminary. I wouldn't be inclined to go along very well with a general shotgun question and answer. I assume it is a preliminary question. In any case, you can develop it more fully, if you feel it necessary, on cross examination. Go ahead.

Q. Mr. Tenzler, did any other person, firm or corporation other than the Northwest Door Company own any [13] interest in this Green Forks timber?

A. Yes, the Vancouver Plywood Company of Vancouver, Washington.

Mr. Collins: That is all.

The Court: Cross Examine.

Cross Examination

Q. (By Mr. Melchior): Mr. Tenzler, do you know who owned title to the land in the Green Forks tract at the time that it was lumbered?

Mr. Collins: Just a moment please. I will object to that on the same ground raised by Mr. Melchior. We have a written instrument that serves as a foundation for this transaction and I believe it should be before the Court too.

The Court: Well, the question of Mr. Tenzler's knowledge of who owned the legal title might in and

(Testimony of H. E. Tenzler.)

of itself be a fact for some consideration. I am not sure, but it is possible that it would be. Accordingly the objection will be overruled. The question is, did he know who held the legal title.

A. The timber was purchased from the Forest Service.

Q. Of the United States Department of Agriculture, is that right? [14]

A. Is that the question you asked?

Q. Well, who purchased it from the Forest Service?

A. The Northwest Door Company so far as I recollect.

Q. Was that done pursuant to the contract, sir?

A. With the Forest Service?

Mr. Collins: I object to that as calling for a legal conclusion.

The Court: Overruled, overruled, go ahead.

Q. Was there a contract between the Northwest Door Company and the Forest Service pursuant to which this was purchased?

A. Yes, there was.

Q. I will show you stipulation, Exhibit 2 for identification. Is that the contract?

A. It appears to be the contract.

Mr. Melchior: The Defendant offers stipulation, Exhibit 2 for identification as its exhibit.

Mr. Collins: No objection.

The Court: Exhibit 2 is admitted.

(Plaintiffs' Exhibit No. 2 admitted in evidence.)

Q. To your knowledge, Mr. Tenzler, was there

(Testimony of H. E. Tenzler.)

any other written contract between the Department of Agriculture and the persons interested in taking the lumber off this tract other than this Exhibit 2? [15]

A. I don't believe I can answer that. I think you have other witnesses who are better qualified to answer that technical question than I am.

The Court: To your knowledge, Mr. Tenzler.

A. (Continuing) To my knowledge I don't believe there was, but I am not——

The Court: You don't know of any? That is what the question calls for. A. No.

Q. To your knowledge, Mr. Tenzler, was the Department of Agriculture advised as to the identity of the person who would conduct the actual logging on this tract?

A. I think they were advised and I think they knew about it.

Q. What was the object of your company entering into this contract with the Department of Agriculture, Exhibit 2?

A. The purpose was to assure ourselves of a supply of logs.

Q. For use in your own business?

A. That is right.

Mr. Melchoir: That is all.

The Court: Anything further?

Redirect Examination [16]

Q. (By Mr. Collins): Mr. Tenzler, referring back to Exhibit 2, that is the Forest Service con-

(Testimony of H. E. Tenzler.)

tract upon which Northwest Door Company was the successful bidder, did any other person, firm or corporation participate with Northwest Door Company on the bid?

A. With the Northwest Door? No, I do not recall.

Q. Did the Northwest Door Company agree with any other person, firm or corporation excluding Ellison that in the event the bid were successful the timber would be shared with such other person, firm or corporation?

Mr. Collins: Excuse me, your Honor. May I hand the witness an exhibit?

The Court: You may.

Mr. Collins: Give me Exhibit 3 please.

Q. (Continuing) Exhibit 3 is being handed to you, Mr. Tenzler to refresh your memory on that point.

Mr. Collins: May I approach counsel?

The Court: Yes, of course.

(Whereupon, Mr. Collins conferred with opposing counsel.)

Mr. Collins: (Continuing) Mr. Melchior has consented to stipulate to the answer to that question that Vancouver Plywood Corporation and Northwest Door Company did have an agreement between themselves to share in that timber in the event the Northwest Door bid was successful. [17]

Mr. Melchoir: We stipulate to that.

The Court: Very well, the record now shows that

(Testimony of H. E. Tenzler.)

stipulation. You needn't bother with an answer, Mr. Tenzler.

Mr. Collins: I have no further questions.

The Court: You are excused and may leave when you wish, Mr. Tenzler.

(Witness excused.) [18]

EDGAR N. EISENHOWER

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Edgar N. Eisenhower, E-i-s-en-h-o-w-e-r.

Q. Mr. Eisenhower, what is your occupation?

A. I am an attorney-at-law.

Q. Now referring to the year 1947, were you an attorney-at-law at that time?

A. Yes, sir, practicing in Tacoma.

Q. And did you have any connection with Northwest Door Company?

A. At that time I was Director, Secretary and their counsel.

Q. Now?

A. I am not now interested in any way with Northwest Door.

Q. Have you ever met Mr. Robert F. Ellison?

A. If I did I don't remember.

(Testimony of Edgar N. Eisenhower.)

Q. Have you ever heard of him?

A. Yes, sir. [19]

Q. Under what circumstances and approximately when did you first hear of Mr. Ellison?

A. The first time that I ever heard of Mr. Ellison was when Mr. Tenzler and some of his lieutenants asked me to come over to the company's office for the purpose of discussing the manner in which Northwest Door was going to finance the purchase of some timber from Mr. Ellison. That was the first time I ever heard of him and I think on that occasion——

Mr. Melchior: If your Honor please, excuse me, sir, I don't mean to interrupt—I do mean to interrupt, but I am sorry. I move that be stricken because the question as asked referred only as to time and the witness is testifying——

The Court: Something beyond that, but I am not inclined to stand on the formalities of this because after all it is a non-jury matter. Eventually I have got to decide what part of the whole testimony should be given effect.

Mr. Melchior: Surely, your Honor.

The Court: Just so you have your objection in the record.

Mr. Melchior: I just want to establish our point on that because we are trying to hold this very narrowly within documents and we are going to object to any [20] attempt to widen the issue beyond what the documents themselves contend.

The Court: You make your position very clear

(Testimony of Edgar N. Eisenhower.)

and then I will say that without the necessity of continued or further objections as far as the Court is concerned, the record will show that you strictly hue to the line of no parol evidence to alter the terms of the written documents in evidence. Is that agreeable to you so as to save further interruption?

Mr. Collins: Yes, your Honor.

The Court: Very well, and then ultimately when the evidence is in we will then consider what effect, if any, is to be given to any of the evidence. I think that will save us all time and avoid the necessity of these interruptions.

Mr. Melchior: I appreciate that.

The Court: Which, of course, are your obligation to make and I am not being critical at all.

Mr. Melchior: But we do have a continuing objection on that ground?

The Court: Very well, you have a continuing objection throughout the trial to the admission of evidence, parol evidence to alter the terms of written documents, is that correct?

Mr. Melchior: Yes, that is our position. [21]

The Court: Do you agree that they shall have that?

Mr. Collins: So agreed.

The Court: Very well, go ahead now.

Mr. Collins: Will you please read to Mr. Eisenhower the last question.

(Whereupon the Reporter read back the last question.)

The Court: Put another question, go ahead.

(Testimony of Edgar N. Eisenhower.)

Q. At that time was this timber the Green Forks timber?

A. I don't remember the name, but they had some reference and it was in an agreement that I drafted.

Mr. Collins: Will you please hand the witness Exhibit 3.

Mr. Melchior: We will agree it was the Green Forks timber.

Mr. Collins: Thank you.

The Court: And the timber referred to in Exhibit 3.

Mr. Melchior: That is all the same question, your Honor.

The Court: All right.

Mr. Collins: Possibly it would save time if we could stipulate that the timber referred to in Exhibits 2 [22] and 3 is the timber that the witnesses and counsel will refer to as Green Forks.

The Court: And which is the subject matter of this controversy.

Mr. Melchior: That is right, your Honor. We will agree.

The Court: It is understood, I have it in mind.

Q. Now on that occasion did you and the other officials of the Northwest Door Company who were present have some discussion regarding the Green Forks Timber transaction and the method of financing to be used? A. Yes, sir.

Q. In substance—strike that please. Was this the only meeting that was held on this subject?

(Testimony of Edgar N. Eisenhower.)

A. No, sir, I think we had more than one.

Q. Now in substance what eventually was decided as a result of those meetings would be the manner in which this transaction was to be handled?

A. Mr. Collins, in order to make any sort of an answer I have got to go back a little bit beyond the date of your question. I think it was Ted Wall who lived at Woodland who came into the home office of the Northwest Door Company in Tacoma and stated that they had a piece of timber up on the Columbia River somewhere. You call it the Green Forks. He had a piece of timber up there that Mr. Ellison would like [23] to buy, and if Northwest Door Company put up the money Mr. Ellison would buy it and log it and sell Northwest Door the logs. And we had a discussion at that time, as I remember it, trying to determine how much money was going to be required to build his roads and other things, and how much money Mr. Ellison himself had which he could put into the project, and how we would secure Northwest Door for two things that they were interested in. First, the return of its money, and secondly, the acquisition of the logs that it wanted in its plywood plant. Those are the two things we were interested in.

And at that time, Mr. Collins, I didn't know anything about any interest that Vancouver Plywood had in that timber. In fact, I don't think Vancouver Plywood had any interest until the day of the bid.

(Testimony of Edgar N. Eisenhower.)

Q. Now eventually what security device was hit upon to accomplish the purpose you have stated, that of securing the Northwest Door Corporation?

Mr. Melchior: I object.

The Court: The form of the question is objectionable. It is leading and suggestive.

Q. (Continuing): Did you eventually hit upon a security device for achieving the ends that you desired to achieve?

Mr. Melchior: Same objection. [24]

The Court: I think the objection is again well taken.

Q. (Continuing): What, if anything, was eventually decided would be the manner in which the transaction would be set up so as to secure Northwest Door in the particulars you have stated?

Mr. Melchior: Same objection.

The Court: Overruled. This time I think perhaps that is a fair enough question.

A. I drafted an instrument wherein I set down what I thought was sufficient provisions for the security of Northwest Door in the two things they were interested in, one of which was to get its money back and the other was to get logs.

Mr. Collins: Hand Mr. Eisenhower Exhibit 3, please.

Q. Exhibit 3 has been handed to Mr. Eisenhower.

A. Well, the instrument that I drew was on different size paper than this. This is somebody's copy of what I did and then it has been photostated, or

(Testimony of Edgar N. Eisenhower.)

some other treatment has been given it to make copies of it. This is not the piece of paper that I prepared in my office. However, the wording may be the same.

Q. I think for purposes of this action, Mr. Eisenhower, the parties have by the pretrial order agreed that—— [25]

A. That this is it?

Q. ——you may treat that as it.

A. All right, all right.

Mr. Melchior: As what? As what Mr. Eisenhower drafted? I am afraid I can't agree to that. That is what finally resulted. That is as far as we will go.

A. (Continuing): If you have a copy of the instrument you presented to me and if the wording is the same as on that one, that is the instrument that I drew.

Mr. Collins: May I have the complaint in this action please?

A. (Continuing): I don't say these aren't my words.

The Court: I understand it. Just that that particular draft is not a copy from your office.

The Witness: That is right.

Mr. Melchior: Maybe I can save some time, your Honor. If Mr. Eisenhower would testify that the paper in front of him is in substance, is the substance of what he prepared I wonder if that would help and we could go on.

The Court: The point is, was the thing modified

(Testimony of Edgar N. Eisenhower.)

after Mr. Eisenhower drafted it originally or not, that is the question. Mr. Eisenhower doesn't want to verify this without examining the draft of his document.

Mr. Melchior: That is correct, and I can't agree—— [26]

The Court: You can't blame him for that.

The Witness: If the Court please, I know the instrument I drafted was signed by Northwest Door. That, I now see. But I don't know whether this without reading it and without comparing it with that other is a true copy of what I drafted. Now you have one which you presented to me which was a true copy. Do you remember that one?

Mr. Collins: Yes.

The Witness: Have you compared that with this?

Mr. Collins: Word for word.

The Witness: Then all right. I am willing to testify. This is the thing that I drew.

The Court: All right. We will inquire further into that if need be. Go ahead.

Q. Prior to the time you prepared this agreement did you receive any instructions from the head of the corporation as to what you were to prepare in the way of a contract or agreement?

A. Mr. Collins, I was in on the conference that decided what we would do and the job of preparing the instrument was passed over to me and I prepared it.

Q. Will you please explain in your own words

(Testimony of Edgar N. Eisenhower.)

without reference to the contract language of the instrument what it was you intended to do in drafting the instrument?

A. Mr. Collins, I had instructions from our conference [27] to draft such instrument as I thought would safeguard Northwest Door in the advances which it was making to Mr. Ellison, and secondly, to see that Mr. Ellison delivered to Northwest Door the logs which Northwest Door wanted to use in its plywood plant. Those were my instructions. And this was before the bid date. After the bid date I was told that Vancouver Plywood Company had joined with Northwest Door in the purchase of that timber for Mr. Ellison and I then re-drafted the instrument to include Vancouver Plywood as a part of the parties of the first part who were going to advance the necessary funds needed by him to purchase this timber and log it. That was my purpose.

Mr. Collins: That is all, you may cross examine.

Cross Examination

Q. (By Mr. Melchior): Mr. Eisenhower, the exhibit which was handed to you, Plaintiffs' Exhibit 3, has been stipulated to be a true copy of what it purports to be according to the pretrial order. I take it then from your testimony that that is the instrument which you actually drafted?

A. I assume so from the statement that Mr. Collins made that he had compared it with the copy that I had in my office this morning.

Q. Your testimony, however, is that the instru-

(Testimony of Edgar N. Eisenhower.)

ment [28] which you drafted in the same form became the final contract? A. Yes, sir.

Q. Now I take it that you are an attorney of considerable experience, sir?

A. Well, let's say I have been at it for a long time anyway.

Q. How many years?

A. Forty-one years in the practice of law in Tacoma.

Q. And you are personally familiar in your capacity as an attorney and as an officer and director of companies such as Northwest Door with the customs and requirements of the trade of cutting timber and bringing it to the mill, is that correct?

A. I have drafted a great number of instruments, the effect of which is to get logs out of the woods into somebody's mill for consumption. They are not always the same kind, and I don't know that you could say, Mr. Melchior, that there was any kind of a custom that was adopted by everybody. I think you had to draft your instruments to fit the particular problem that each man would produce when he wanted to get out certain logs.

Q. Now this particular case prior to the time that you were requested to draft this instrument, Exhibit 3, did the responsible officers of Northwest Door confer with [29] you about the objection, the desire to achieve in this connection and the way to do it?

A. Mr. Tenzler was the only party interested in Northwest Door. He owned all the stock and what-

(Testimony of Edgar N. Eisenhower.)

ever he said was final and we always conferred with each other whenever we had a problem of financing somebody who was going to produce logs that could be used in the plant. And as I say, we used different kinds of instruments and different forms of agreements to accomplish that result.

Q. Now in this specific instance concerning Mr. Ellison and Green Forks lumber, did you and Mr. Tenzler have a discussion about the object you sought to accomplish before you sat down to draft the instrument?

A. More than one, yes, sir.

Q. And to the best of your ability did you put into the instrument the objects which you and Mr. Tenzler intended to accomplish?

A. My commitment, Mr. Melchior—let's put it this way. My commitment was to see that the company was secured in its advances. The particular way in which it was done was left up to me and I had to devise what I thought was going to be the best kind of security that I could get for my client and it happened at that time that I used this method. I used other methods. For instance, Mr. Ellison—— [30]

Q. I don't think we have to go into that, sir.

A. Okay. I thought you might be interested in other things done at the same time.

Q. Not now. What I am asking is simply this. You and Mr. Tenzler had an idea what was to be done and you had at that time a considerable accumulated experience as an attorney in drafting in-

(Testimony of Edgar N. Eisenhower.)

struments and in dealing with the type of problem presented to the company by this situation. My question, sir, is whether you then achieved to the best of your ability the task of incorporating these considerations in the instrument which you have seen, Plaintiffs' Exhibit 3?

A. I think my best answer to you is the fact that Mr. Ellison carried out his contract. Northwest Door was repaid its advances and it got the logs that Mr. Ellison promised to deliver. Beyond that I don't know what else I could have done. That is what I was supposed to do.

Q. I still don't think, with all deference, that you answered my question, although I appreciate the explanation.

A. Then I am too thick to answer.

The Court: I think you can answer the question yes or no. Read the question.

(Whereupon, the Reporter read back the question indicated.)

Mr. Collins: I will object on the ground it [31] doesn't specify what considerations——

The Court: Well actually, gentlemen, the answer is self-evident.

Mr. Melchior: Of course it is, but I ought to get it on the record.

The Court: Well in a way it is a conclusion I think that the witness is not obliged to draw unless he desires to. I take it what he means, Mr. Eisenhower, is, are you satisfied that you accomplished by this document to the best of your ability the ob-

(Testimony of Edgar N. Eisenhower.)

jectives that were assigned to you?

A. (Continuing): I think I did; I think I did. It was carried out.

Q. And you chose language which you considered to be appropriate for your objective, isn't that true?

A. Certainly, those are my words.

Q. Mr. Eisenhower, on direct examination you said that the problem arose because the company was advised that Mr. Ellison had certain lumber. Do you recall that? A. No.

The Court: Lumber?

Q. Timber. Timber. I am sorry, timber; that he wanted to buy certain timber which he wanted to log. If I said that he had certain lumber, that isn't quite an accurate statement. [32]

The Court: That isn't the way I remembered it either.

A. He wanted to acquire certain timber to log and he needed financing to help do it and he came to Northwest Door to acquire that financing.

Q. And what he wanted to do was to log it, let's be precise about that.

A. He was in the logging business and he——

Q. He wanted to log this timber, is that right?

A. Yes, and sell us the logs.

Mr. Melchior: That is all.

The Court: All right, Mr. Eisenhower, you are excused.

Mr. Collins: I have one more question.

The Court: Excuse me.

(Testimony of Edgar N. Eisenhower.)

Redirect Examination

Q. (By Mr. Collins): Mr. Eisenhower, during the exploratory talks that were had concerning the method of financing and security to be used, was any consideration given to taking a mortgage upon Mr. Ellison's equipment rather than using the device that ultimately was used?

A. I explored every possibility for security including the possibility of making a loan on any equipment [33] which Mr. Ellison had which could be mortgaged for the advance which we were willing to make. I determined there wasn't enough security to justify us taking a mortgage so I had to work some other device and this is the thing that resulted from it.

Mr. Collins: Thank you, that is all.

Mr. Melchior: One more question, if I may.

The Court: Yes.

Recross Examination

Q. (By Mr. Melchior): Mr. Eisenhower, if you can answer this just yes or no I'd appreciate it. As an attorney does the phrase "employment contract" have a meaning to you?

A. Does the phrase "employment contract" have a meaning?

Q. Yes.

Mr. Collins: Just a moment, if you please, your Honor. I believe it is asking an expert witness to testify upon the one subject that an expert can't testify on and that is what is the law before him.

The Court: I think not. I think the question may

(Testimony of Edgar N. Eisenhower.)

be answered yes or no and then if the answer is yes we will hear what it is.

A. Well, I'd say yes. [34]

The Court: Does this term have some technical meaning to you?

The Witness: Well, it has a meaning to me, yes.

The Court: All right, he says it does.

Mr. Melchior: I am not going to inquire beyond that point.

The Court: All right.

Further Redirect Examination

Q. (By Mr. Collins): I would like to know, have you elaborate on your answer and explain if you will please.

A. A strictly employment contract means that you are going to be my servant and I am going to tell you what and when you are going to do a certain job. That is what an employment contract means to me.

The Court: Seems to answer it very thoroughly.

Mr. Collins: That is all.

The Court: You may leave whenever you wish, Mr. Eisenhower.

Would you like to proceed, gentlemen?

Mr. Collins: Mr. Murphy.

(Witness excused.) [35]

EUGENE C. MURPHY

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs, and testified as follows:

(Testimony of Eugene C. Murphy.)

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Eugene C. Murphy.

Q. What is your occupation, Mr. Murphy?

A. I am the office manager at Northwest Door Company.

Q. And how long have you held that position?

A. Since the fall of 1947. I have been employed there since May of 1947.

Q. Now in your capacity as office manager, are you the custodian of the company's records?

A. I am.

Q. Do your duties also encompass supervision of the keeping of the books of account of the Northwest Door Company?

A. Yes, in charge of the accounting staff.

Mr. Collins: Please hand the witness Exhibits 6, 7, 8 and 9.

Q. Will you please examine Exhibit 6, Mr. Murphy. I don't believe it is necessary that you read any of these to the point. [36]

A. I recognize it.

Q. Is that document a portion of the records of the Northwest Door Corporation? A. It is.

Mr. Collins: Exhibit 6 is offered in evidence.

Mr. Melchior: No objection.

The Court: Exhibit 6 is admitted.

(Plaintiffs' Exhibit No. 6 admitted in evidence.) [See pages 133-134.]

(Testimony of Eugene C. Murphy.)

Q. Will you please examine Exhibit 7.

A. I recognize that also.

Q. Is that document a portion of the record of Northwest Door Company? A. It is.

Mr. Collins: Exhibit 7 is offered in evidence.

Mr. Melchior: I object to that, your Honor, on the ground that it is hearsay. The stipulation covers this exhibit only to the point that it has been agreed that this is what it purports to be, but——

The Court: I will have to have a look at it of course to see what it is.

Mr. Melchior: But with respect to its contents I think there is an objection on the merits.

The Court: Yes, that is what I am trying to do. This appears to be on the face of it an inter-office communication [37] which is denominated an inter-department correspondence from which I assume it is a memorandum from one person in the Northwest Door Company to someone else in the Northwest Door Company, the names being Mr. Tenzler to George Raknes. Is that what it is?

Mr. Collins: Yes, your Honor.

The Court: Is that what the document is, Mr. Murphy?

The Witness: Yes.

The Court: Private communication inter-office between officials of the same company. I can't see how that would become admissible or have any bearing on the case.

Mr. Collins: May I be heard?

(Testimony of Eugene C. Murphy.)

The Court: Yes, of course, certainly you can.

Mr. Collins: May I see the exhibit? The purpose of this exhibit is largely explanatory——

The Court: Well, the point we have on the matter of the admissibility is simply this: Under what circumstances would an inter-company communication from one person in the company to the other, under what circumstances would such a document become admissible in an action of Ellison against the Collector? That is the problem.

Mr. Collins: The purpose for which it is offered and then answer the question of law.

The Court: Any way you want to do it. I am not [38] a stickler for how you do it. You do it in the way it seems best for you.

Mr. Collins: Exhibit 3 shows that there was an interest in Vancouver Plywood Corporation in this transaction. Now we are going to show in order to avoid confusion, though it is not particularly important to our case one way or the other, that at a later date and before the actual harvesting of timber got under way, the Vancouver Plywood Corporation bowed out of this transaction and that is the purpose of the offer of this exhibit.

Now as to the legal question that has been posed by the defendant——

The Court: Well gentlemen, I will tell you, I think we are wasting time on a matter of this kind in a situation of this kind. This is a non-jury matter and the objection very properly is made, has been made, and if it is not proper to consider this

(Testimony of Eugene C. Murphy.)

document, I will not consider it. But in any case, it is part of the record, it is an offered exhibit. If in any respect it is either error to admit it or to deny it, that is reviewable on appeal and I think maybe we are taking time with formalities here. You may object. I will overrule the objection, admit the exhibit in evidence and we will see whether it has any bearing on our case when we get through.

Mr. Melchior: There is one problem in that [39] connection which wasn't disclosed by counsel's statement, and I am not trying to waste time——

The Court: I know you are not, of course. I am not suggesting——

Mr. Melchior: I know your Honor, but I have this problem of time in mind is all I am saying. With respect to this particular feature of the Vancouver getting out, I am willing to stipulate it and get it out of the case entirely. But there is another statement in this stipulation, Exhibit 7, which I think is purely hearsay in addition to being a conclusion of law and which would, if accepted, perhaps be prejudicial to our case, and that is the reason for my objection.

The Court: If you are willing to stipulate that Vancouver Plywood got out of the deal and approximately the time it was done, that is the only purpose for which this exhibit has been offered up to now.

All right, the exhibit will be admitted for the purpose stated and to that extent.

Mr. Collins: I'd like to offer it for one other pur-

(Testimony of Eugene C. Murphy.)

pose too, your Honor. It contains evidentiary matter. In the first paragraph, second sentence, first paragraph of proposed form of letter to Vancouver Plywood Company starting with the words, "As you know,——"

Mr. Melchior: That is what we are objecting to, [40] your Honor, that is one of the——

The Court: Yes, I don't think it adds anything to it, but I am going to admit the exhibit, Exhibit 7, over the objection made and we will give it whatever weight ultimately it seems appropriate to give it. I, of course, could make the observation that Mr. Tenzler was here as a witness and anything that he properly had to say about the matter could have been elicited from him without reference to the exhibit, but in any case, the exhibit is admitted over the objection made. Go ahead.

(Plaintiffs' Exhibit No. 7 admitted in evidence.)

[See pages 135-137.]

Mr. Collins: And just so there be no misunderstanding, it has been withdrawn, my offer of it for the limited purpose, and substituted my offer for general purposes.

The Court: It is admitted for all appropriate purposes over the objection in the manner indicated by Mr. Melchior. Go ahead.

Q. Do you have Exhibit 8, Mr. Murphy?

A. I have.

The Court: That is the lumber account with Ellison?

(Testimony of Eugene C. Murphy.)

Mr. Collins: Yes.

The Court: Any objection to that? [41]

Mr. Melchior: No objection.

The Court: Exhibit 8 is admitted.

(Plaintiffs' Exhibit No. 8 admitted in evidence.)

Mr. Collins: I will also offer 9.

Mr. Melchior: No objection.

The Court: Nine is admitted. Nine appears to be disbursement vouchers and a settlement sheet all of course of the Northwest Door Company. All right, anything else from Mr. Murphy?

(Plaintiffs' Exhibit No. 9 admitted in evidence.)

Q. Now Mr. Murphy, in your capacity as the department head, did you have anything to do with the preparation or submission of the Northwest Door Company's income tax returns for the year 1949?

A. One of the signers as chief accountant at that time.

Q. State whether or not Northwest Door Company claimed any capital gain treatment on the Green Forks transaction. On the Green Forks contract, I am sorry, on timber cut on the Green Forks contract during the year 1949.

Mr. Melchior: I object. That has no relevance to Mr. Ellison's case.

The Court: I will let the record go in to make [42] the case. Over objection it is admitted. Did it?

(Testimony of Eugene C. Murphy.)

A. Northwest Door did not take any capital gain on that piece of timber.

The Court: Gain or loss?

The Witness: Gain or loss.

Q. Do the records of the Northwest Door Company show whether or not the Vancouver Plywood Corporation owned any interest in the Green Forks contract? A. Yes, they did, or do.

Q. And in order to avoid ambiguity corresponding to those records, did or did not Vancouver Plywood Corporation own any interest at one time in the Green Forks contract? A. They did.

The Court: The Green Forks contract. You are referring of course to the contract of purchase from the United States Government, Exhibit 2; that is, the contract you are referring to?

Mr. Collins: Yes, your Honor.

The Court: There is more than one contract in evidence all referring to Green Forks, so we had better be sure which one we are talking about. All right.

Q. Do the records of the Northwest Door Company show whether or not the interest of Vancouver Plywood Corporation in the Department of Agriculture Green Forks [43] contract was ever terminated? A. It was terminated.

Q. And if you know, approximately when?

A. I don't know the exact date. It must have been in the fall of 1947 or perhaps early part of 1948.

Q. Now are you——

(Testimony of Eugene C. Murphy.)

Mr. Collins: May I have Exhibit 2, please.

Q. (Continuing): Exhibit 2 which is the Department of Agriculture contract and related documents, contains a surety bond, bond on which the Aetna Casualty and Surety Company appears as a surety. Do you know who paid the premium on that bond? If so, who?

A. It was originally paid by Northwest Door and then we deducted, voided and deducted the amount from Mr. Ellison.

Mr. Collins: May I have Exhibits 8 and 9 please. I don't need them we have copies. I am sorry.

Q. Now will you please refer to Exhibit 8, the ledger account, Mr. Murphy. Do the records of the Northwest Door Company show whether or not any money was ever loaned to Mr. Ellison?

A. There was \$50,000 advanced on March 16, 1948, and \$50,000 advanced on August 2nd of 1948.

Q. Were these sums repaid?

A. They were. [44]

Q. In what manner were these sums repaid?

A. They were deducted from remittances made to Mr. Ellison in a certain amount per thousand.

Q. Now to what account on the Northwest Door Company's ledger were these remittances made to Mr. Ellison charged? A. The \$50,000?

Q. No, the remittances made to him for logs?

A. Oh they were charged to our log purchase account.

Q. Now are you acquainted with the Revenue Agent named Gilmore? A. I met——

(Testimony of Eugene C. Murphy.)

The Court: Are you going to be with Mr. Murphy for some little time further?

Mr. Collins: Well, I don't think we will, but the——

The Court: I think we will take a short break in the day.

(Whereupon, at three-twenty-five o'clock p.m. a recess was had until three-forty-five o'clock p.m. at which time the witness resumed the stand and with all counsel being present, the following proceedings were had, to-wit:)

Mr. Collins: You may examine. [45]

Mr. Melchior: No questions.

The Court: Call another.

ROY L. AUSSERER

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Roy L. Ausserer, A-u-s-s-e-r-e-r.

Q. What is your occupation?

A. Log and lumber department manager Northwest Door.

Q. When did you start to work for the Northwest Door Company? A. November, 1941.

Q. And would you briefly tell us what your job encompasses? A. At present?

(Testimony of Roy L. Ausserer.)

Q. Yes.

A. The procurement of logs and lumber for the Northwest Door Company and to see that the various contracts and so forth toward the procurement of logs and lumber are administered in accordance with the contracts. [46]

Q. Now your duties also include the disposal of logs that are not suitable for use in the operation of your employer? A. Yes.

Q. In general what type of logs are not suitable for use in your employer's operations?

A. To answer that question, all logs are suitable for the end result. In other words, if the log is not in itself peelable at our plywood plant, the other logs could be traded for peeler for our plant, so they are all usable in a different vein, I guess.

Q. Well then, to sum it up, Mr. Ausserer, is it a correct statement, your employer in its manufacturing activities uses, that is, physically uses only such logs as can be peeled in plywood sheets?

A. That is correct.

Q. And——

The Court: The others you have you use for "swapping" to use a good old homely expression?

The Witness: Yes.

Q. (Continuing): Going back to 1947, in what capacity did you serve Northwest Door Company?

A. I was assistant to the manager of the log and lumber department.

Q. Now when and how were logs acquired by

(Testimony of Roy L. Ausserer.)

Northwest [47] Door Company during 1947, 1948 and 1949?

A. During these three years they were acquired principally by two means, open market purchases and through financing of loggers.

Q. When you say financing of loggers, what do you mean?

A. Well normally a logger would come to us and tell us about a piece of timber he'd like to buy and then we'd loan him the money to build the roads or loan him the money to buy the timber and we'd make a contract to get the logs from that piece of timber.

Q. Did the Northwest Door Company engage in logging for its own account during 1947 or 1948 or 1949? A. They did not.

Mr. Melchior: I wonder if that doesn't state a conclusion of law, your Honor? I will object.

Mr. Collins: Which question, Mr. Melchior?

The Court: Well, it probably does, but I take it what he means is that does Northwest Door directly through its own direct employees do any logging.

The Witness: They do not, your Honor.

Q. Did Northwest Door Company own any stand of timber at the time the purchase of the Green Forks timber was made, that is, any other stands?

A. Yes, they did.

Q. Now without asking you footage, can you tell [48] us whether it was a small, medium or large quantity?

(Testimony of Roy L. Ausserer.)

A. In the terms of the operation I'd say at that time it was a rather small amount.

Q. Now going back to the financing of the loggers, how were these financing arrangements handled? A. Well——

Q. I mean as a matter of practice, who did what? A. May I have that read back?

(Whereupon, the Reporter read back the question indicated.)

A. Well, in many cases it was a matter of a mere cash advance and if the logger had sufficient collateral such as logging equipment or something like that which he owned outright and on which we could take a chattel mortgage, we would take that and enter into a logging contract whereby we set forth what he was to do and what we would do. We'd get the logs or in some cases we would actually buy the timber and then advance maybe additional funds for road building or what have you, and then as the logs were taken out, we would withhold the stumpage which we had advanced as well as additional advance to cover any money advanced like falling and bucking. Does that answer your question?

Q. Up to a point.

A. There were many kinds of ways of doing it. There [49] was no one pattern as stated here earlier.

Q. Now when you put up the money you say to buy the timber for the loggers, then what were the mechanics of your—what were the mechanics of

(Testimony of Roy L. Ausserer.)

disposition of the logs, what became of the logs when they were gotten out of the woods?

A. Well they were—it was agreed upon a point of delivery which is normally dumped, rafted and scaled in the water and in most cases that was the case. And then we would buy the logs from the logger at the prevailing market price regardless of what it was, and then we would pay that sum to the logger and withhold any advances we had made for stumpage or prepaid logging costs.

Q. Now at what point during the transition of the logs from the woods to the mill were the purchases of the logs actually made, and when did you accept the logs for your company, or when did your company accept the logs? A. Well—

Q. For itself?

A. We are not speaking about any specific—

Q. No, general practice.

A. There are different terms there also, but normally the prevailing practice, as I recall at that time and still, for that matter, is that after a bunch of logs are put into the water and rafted and scaled, and upon receipt of a scale certificate, we would negotiate the [50] purchase from the logger technically in the case of a peeler rate. Oftentimes in the case of a non-peeler rate we pay him, we bought the raft from him for the same price and at the time we were able to negotiate a sale of their raft.

Q. In other words, referring to saw logs not suitable for use in your peeler plant, is it a correct statement of what you just said—

(Testimony of Roy L. Ausserer.)

Mr. Collins: I appreciate I may be leading, Mr. Melchior.

Q. (Continuing): —that at such time as you were able to find an ultimate consumer for those saw logs you then bought them from the logger, resold them to the ultimate consumer and paid the logger what you got for them less agreed deductions? A. That is correct.

Q. Now was this procedure followed by Northwest Door Company on logs that came from Green Forks timber tract? A. That is correct.

Q. Now you testified that when you bought the logs from the logger and made your remittances to him, that you made agreed deductions. Now what were those deductions, not in amount, but for what purpose?

A. Well, deductions would be for stumpage or cost [51] of the timber on the stump, any monies we had advanced for, like road building costs. We normally paid the dumping, rafting and scaling charges for reasons of bookkeeping and then we would withhold them, we would deduct from the logger at that time and then of course in the case of any raft that you buy you always are entitled to one per cent cash discount if you pay the bill within ten days, and we always did that. Normally that is what it is.

Q. During the period, during this period, 1947 through 1949 inclusive did you at any time have any logging contracts with operators who are termed in the trade "gypo"? A. Yes, we did.

(Testimony of Roy L. Ausserer.)

Q. Were these transactions similar to the Green Fork contract?

A. Some were and some weren't.

Q. Explain that please.

A. Well, we had some contracts with log contractor where we advanced the gypo who got the deal to our attention. We advanced him money to buy the timber such as in the case we are talking about. And then we withheld that advance. Then again we had other kinds of contracts where we owned the timber outright and paid him so much per thousand for bringing the logs out to us, kind of a service charge. [52]

Q. That is, you paid him a flat sum for getting the logs out of the woods and to a delivery point?

A. That is correct.

Q. Was there any one per cash discount made from that latter type of arrangement?

A. No, that is a flat fee.

Q. And did the—state whether or not the price paid the man under that latter type of arrangement remained constant regardless of market fluctuation.

A. It remained constant.

Q. Now to what——

Mr. Collins: May I have Exhibit 9 please? Hand Exhibit 9 to the witness please.

Q. (Continuing) Now you are examining Exhibit 9, Mr. Ausserer. Do you know what that is?

A. Yes, sir. I prepared it.

Q. Are these particular documents a fair representation of the general manner in which settle-

(Testimony of Roy L. Ausserer.)

ments were made with Mr. Ellison on the Green Forks timber? A. Yes, they are.

Q. Now would you please turn to the second sheet of the exhibit, down at the bottom of the page appears the item "charge account 1009." What is account 1009?

A. All logs which we purchase for—all logs which we purchase are charged to log purchase account 1009. [53]

Q. Now will you please examine a little bit above that item on the same page. There is an item "stumpage" and then an itemization by varieties.

A. Yes.

Q. What does that include?

A. That is the rate at which we deducted a fixed sum for those feet according to specie to reimburse us, to get back the money we had advanced for the purchase of the timber.

Q. Was there any deduction made for slash disposal guaranty?

A. I don't know whether it was included in those figures or not.

Q. Now returning to these other types of contracts where the man received a stipulated sum per thousand for getting out the logs regardless of market fluctuation, to what account were disbursements made to those people charged?

A. They have a separate account. I believe it is a—I am not positive. It is 175 dash something or other series.

Q. And——

A. Logging contract series.

(Testimony of Roy L. Ausserer.)

Q. Is that the title of the account, logging contract?

A. Well, it is a—contractor is the title of it, contractor. Whether that is the exact title I don't know. [54]

Mr. Collins: I believe that is all.

The Court: Cross?

Mr. Melchior: No questions.

The Court: And you also may leave whenever you wish. Call another please.

(Witness excused.)

Mr. Collins: Mr. Wall. [55]

THEODORE FRANKLIN WALL

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Theodore Franklin, W-a-l-l.

Q. Mr. Wall, where do you live?

A. Woodland, Washington.

Q. And what is your age?

A. Seventy years.

Q. Now were you living in Woodland, Washington in 1947? A. Yes, sir.

Q. And what at time was your occupation?

A. In 1947 I was managing the operation that

(Testimony of Theodore Franklin Wall.)

I sold to the Northwest Door, now known as the Wall Boom.

Mr. Collins: I think I can speed this up, your Honor, if I may lead the witness briefly.

The Court: Yes, go ahead.

Q. Was the Wall Boom a distribution and storage point where various persons in the logging industry brought their logs and made arrangements to get them in shape for further movement? [56]

A. Yes, sir.

The Court: Might tell you that Wall's Boom is very well known to me. I have had lots of cases involving Wall's Boom at one time or another and I am glad to meet the fellow whose name is attached to the boom.

Q. Approximately when were you first employed by Northwest Door Company?

A. When was I?

Q. Yes. A. In January, 1947.

Q. In what capacity did you serve?

A. I stayed on there for the year 1947 managing the operation that we built up and sold to the Northwest Door.

Q. That is the Wall Boom?

A. Yes, now known as the Wall Boom, yes, sir.

Q. Now during that time and in prior years even did you engage in buying logs for Northwest Door Company? A. Yes, sir.

Q. What type of logs did you buy for them?

A. Well, I don't remember them getting anything but peeler logs from our boom there. We per-

(Testimony of Theodore Franklin Wall.)

haps sold them sawmill logs, but I'd say ninety-nine per cent were peeler logs.

Q. Are you acquainted with Mr. Ellison? [57]

A. Yes, sir.

Q. And when did you become acquainted with him?

A. Oh, I'd say along back in the early thirties.

Q. Now, are you familiar with a stand of timber know as Green Forks tract? A. Yes, sir.

Q. Now did you ever, after you had—or did you ever receive any instructions from the Northwest Door Company to look for timber that could be acquired? A. Yes, sir.

Q. Did Northwest Door Company conduct any logging operations of their own in that area? By "that area" I mean the Green Forks area around Woodland?

A. As far as I know there was never any logs come to our boom there.

Q. Were you—in 1947 were you aware of the practice that has been testified to of Northwest Door to finance loggers? A. Yes, sir.

Q. How was this accomplished?

A. How is that?

Q. How did they do it?

A. How did they inform me of it, you mean?

Q. What? A. How did I know? [58]

Q. No, no. You are a little hard of hearing, Mr. Wall? A. Yes, I am.

Mr. Collins: May I approach the witness?

The Court: Yes, but it is best to speak louder

(Testimony of Theodore Franklin Wall.)

because when you approach a witness who doesn't hear well they quite often drop their voice. We often have it happen here.

Mr. Melchior: I wonder if that problem isn't cumulative, your Honor? We could save time by going on.

The Court: Yes, it seems to me it has been pretty fully covered. It doesn't add anything for Mr. Wall to tell us about it again. Go ahead.

Q. When did you first become aware of the availability of the Green Fork timber?

A. In 1946.

Q. Approximately what time of the year?

A. It was in the fall of 1946.

Q. Did you ever discuss the Green Fork timber with Ellison? A. Yes, sir.

Q. When?

A. Well, I think I discussed that with him shortly after the first trip I was up there and looked it over.

Q. And when was that? [59]

A. That was in the fall of 1946.

Q. Now, what was the nature of your discussion with Mr. Ellison about the Green Fork timber?

A. Well, Mr. Ellison was looking for a logging operation and I was instructed by the Northwest Door to look up different tracts of timber and that was one of the first ones I looked over and, well, that is one of the first tracts we looked over.

Q. Did you go through this timber with Mr. Ellison?

(Testimony of Theodore Franklin Wall.)

A. Yes, sir, but not until, oh, I think that was in 1947.

Q. About what time in 1947?

A. Well, the way I remember it, it was along the latter part of 1947 if I remember right. We were there a couple of different times. I remember that. We might have been there before, in the fall too.

Q. Did Northwest Door Company have any interest in the timber at the time you and Mr. Ellison first looked it over?

A. None whatever.

Q. Now, what was the purpose of the two of you going up there to look it over?

A. Well, there was a lot of expense involved in opening up this tract of timber. We went up to see whether we wanted, whether we could figure out a way it could be [60] taken out profitably. That was really the first trip we made up there.

Q. Did you and Mr. Ellison ever discuss Ellison's acquiring that timber and logging it?

A. Yes, sir, but the operation was too big. He had to have someone to finance it.

Q. Now you have testified that you went up there to investigate ways and means of getting it out, see whether it could be extracted profitably. Now, did you ever take any engineer up there to check on the road situation?

A. Yes, sir.

Q. Who was it if you recall?

A. I got Peter Kiewit. They were operating extensively along around Longview and Woodland at

(Testimony of Theodore Franklin Wall.)

that time. They had a very good engineer and I got him to go up there and check our figures.

Q. Is that the firm Peter Kiewit and Sons, the highway contractors? A. Yes, sir.

Q. And state whether or not Mr. Ellison previously had laid out road lines up there.

A. Yes, sir.

Q. And did you have this engineer check them over to see whether or not Mr. Ellison had made any bad mistakes?

A. That is right, that was the purpose of that trip. [61]

Q. Now, did you discuss with any officer of Northwest Door Company the amount that Ellison would require to log that timber? A. Yes, sir.

Q. Approximately what amount was discussed?

A. Well, we were figuring around seventy-five to a hundred thousand dollars.

Q. Did you and Mr. Ellison ever estimate the maximum cost for which that timber could be acquired from the Forest Service and still permitted to be gotten out at a profit? A. Yes, sir.

Q. Now was that information that you and Mr. Ellison worked up furnished to Northwest Door Company? A. Yes, sir.

Q. Was that done prior to the time the Forest Service held the Green Forks Timber sale?

A. Yes, sir.

Q. Now did Mr. Ellison discuss with you the maximum amount that he would be willing to pay for the stumpage? A. Yes, sir.

(Testimony of Theodore Franklin Wall.)

Q. And did you transmit that information on to the Northwest Door Company? A. Yes, sir.

Mr. Collins: You may cross examine. [62]

Cross Examination

Q. (By Mr. Melchior): When did you first go over this Green Forks stand of timber, Mr. Wall?

A. For some reason there is an echo in here. I don't hear very well.

The Court: Other people have that trouble from time to time, Mr. Wall. Come to the podium counsel.

Q. When did you first go over this Green Forks timber stand with Mr. Ellison?

A. Well that was in 1946.

Q. At that time do you know who owned that timber? A. Oh yes, Forest Service timber.

Q. Was that land and timber on it advertised for sale, just the timber on it at that time?

A. No. Let me go back a little bit further. The Forest Service had made a sale right at the mouth of Green Fork to a man by the name of Brown who defaulted on his contract and the Forest Service wanted me to go up there and look that over and complete it. That is while I was investigating that they told me to look over the Green Fork area because they were going to have a sale up there the next year.

Q. The Forest Service told you to look it over?

A. That is right. [63]

Q. So for whom were you working when you looked that land over?

(Testimony of Theodore Franklin Wall.)

A. The first time I was up there I was working for Wall Brothers, for myself. That is prior to my sale to Northwest Door.

Q. That was in 1946? A. Yes, sir.

Q. Did you talk about your inspection with anybody?

A. As soon as I sold out to the Northwest Door why that was going to be part of my duties in 1947 was to acquire timber and that was one of the first projects that I put up to.

Q. That is you put up the Green Forks to Northwest Door for the purpose of their getting timber out of it? A. That is right.

Q. And who was Ellison? Did he live in that area? A. Yes, sir.

Q. What was his business, do you know?

A. Logging.

Mr. Melchior: Your witness.

The Court: In all these matters, Mr. Wall, in all these matters after January of 1947 when you sold out to Northwest, you were acting from then on for the Door Company, were you?

The Witness: Yes, sir, in the year of 1947. [64]

The Court: Whatever interest you took in it then you took it on account of what you understood to be your job with the Door Company, is that right?

The Witness: That is right.

The Court: Yes, all right. That is all, Mr. Wall, and you may leave whenever you wish now.

Mr. Collins: One more question.

(Testimony of Theodore Franklin Wall.)

The Court: Excuse me. This gentleman has one more question.

Redirect Examination

Q. (By Mr. Collins): Mr. Wall, Mr. Melchior asked you what Mr. Ellison's occupation was and you said logger. Now do you know whether or not Mr. Ellison also sold logs?

A. That is right. A logger sells nine times out of ten sells his logs, his own logs.

Q. Will you please explain what you mean by "logger." What is a logger?

A. A logger is a man who goes out into the woods and acquires the timber and he builds his road and if he has got an engineering problem he solves the whole thing, puts the logs into the market. That is what I term a logger.

Mr. Collins: That is all.

The Court: In other words, Mr. Wall, [65] whatever kind of a deal he has got to do, they may vary from every kind of a deal there is, isn't that right?

The Witness: Each operation is a separate engineering field in itself.

The Court: We understand that in this part of the country. There are about as many different kinds of deals for logging as there are deals, isn't that right?

The Witness: That is right.

The Court: And the logger is the fellow who in one manner or another, on one kind of a deal or another, brings the logs out?

(Testimony of Theodore Franklin Wall.)

The Witness: That is right.

The Court: Okay, that is all, Mr. Wall. You may leave any time you want now.

(Witness excused.)

Mr. Collins: Call Mr. Reinsch. [66]

H. G. REINSCH

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: H. G. Reinsch, R-e-i-n-s-c-h.

The Court: Excuse me, how do you spell it?

The Witness: R-e-i-n-s-c-h.

Q. In 1947, Mr. Reinsch, what was your occupation?

A. I didn't work in 1947 until in the fall, about late in July I think I started working, and I had been sick and I couldn't work.

Q. And prior to the time you got sick what was your job?

A. I had been with Northwest Door Company since almost when they started and——

Q. In what capacity?

A. I always was in the purchasing department of raw material.

Q. Now were you in charge of log procurement?

A. Yes, sir.

(Testimony of H. G. Reinsch.)

Q. And did you have the job then that Mr. Ausserer now has? [67]

A. Yes, except I handled the timber end which he has charge of now.

The Court: Let's see if I understand that, Mr. Reinsch. You mean you had charge of the actual logging operations as well as the locating of it and so on?

The Witness: I supervised it all.

The Court: You supervised the whole thing at that time?

The Witness: Yes.

The Court: I see.

Q. Now, when did the Northwest Door Company first start logging operations on its own account?

A. 1949.

Q. Now, were you familiar with the financing arrangement that has been testified to whereby the Northwest Door Company bought timber for loggers and turned it over to them and then bought the logs back?

A. Yes, sir.

Mr. Melchior: I can't accept all of counsel's statement.

The Court: I understand that the question was leading and implies elements that are in controversy, but what you mean is that you are familiar with what has been described here as practices before, is that what you mean?

The Witness: That is right. [68]

The Court: All right, go ahead.

Q. Now when you returned to work in 1947, at

(Testimony of H. G. Reinsch.)

that time from what source did the Northwest Door Company primarily obtain its supply of logs?

A. The open market.

Q. Now, those logs that you purchased in the open market primarily were what type of log?

A. Peeler logs.

Q. Now are you familiar with the Green Fork timber in a general way? A. Yes, sir.

Q. Now are you aware that the company advanced money to Mr. Ellison in connection with this Green Fork job? A. Yes, sir.

Q. Do you know for what purpose the advances were made? A. Yes, sir.

Q. And what were those purposes?

A. Road building, sometimes maybe he was short and needed a little advances to meet bills and sometimes maybe for buying a piece of equipment, to buy a security bond, various reasons why he needed money.

Q. Now at this general time, and I am referring to the latter part of 1947, did you have any other loggers being [69] financed under this same type of arrangement that was used with Mr. Ellison?

A. No, sir.

Q. Now, did you exercise any supervision over the manner in which Mr. Ellison performed his logging operations in the woods?

A. Yes, sir, I paid frequent trips up there to discuss various problems as they came up, utilization and financing as well. Not from the standpoint of running the operation, but from the stand-

(Testimony of H. G. Reinsch.)

point of assisting Mr. Ellison and getting the most efficiency out of it and the most money out of it by giving us what we could pay the most for.

Q. Now at what point were these logs from the Green Fork tract delivered to the Northwest Door Company?

A. At three points. We had a reload at a place named Lucia Railroad up in the road and Wall Boom another place of delivery and also hauled logs directly into Olympia, Washington.

Q. Now state whether or not there was any agreement with Mr. Ellison for the absorption of any loss to logs that might occur before they were delivered into the custody of Northwest Door Company.

A. Well, any loss that took place was too bad for Mr. Ellison. [70]

Q. What do you mean by that, Mr. Reinsch?

A. He would be the loser.

The Court: You mean you were only going to pay him for the logs he got to the dump?

The Witness: Logs delivered to our points.

The Court: To your delivery points?

The Witness: Yes.

Q. Now during the time that Mr. Ellison was carrying on his logging operations in this area, were there any Forest Service personnel present?

A. Yes, sir, at times.

Q. And state whether or not there were any occasions when it became necessary for dealings to

(Testimony of H. G. Reinsch.)

be had in connection with the job with the representatives of the Forest Service? A. Yes, sir.

Q. Now, when such occasion arose, who was it dealt with the Forest Service directly, you or Mr. Ellison or somebody else?

A. If you mean whom did it affect financially, it was Mr. Ellison.

The Court: No, no. He meant who individually would talk with these Forest Service fellows from time to time?

A. (Continuing) Well, occasionally it might have [71] been a general discussion, but usually it was the logging operation that Mr. Ellison performed and Mr. Ellison would be the one that would be questioned.

Mr. Melchior: I didn't hear that.

The Court: Ellison.

Mr. Melchior: Thank you.

The Court: Usually, he said, usually Ellison since he was the fellow who was doing the work he'd be the one who would be talking to him.

Q. Now during the course——

The Court: That is what you meant, wasn't it, Mr. Reinsch?

The Witness: Yes.

Q. During the course of this operation was there any dealing with the Forest Service regarding locating or relocating any of these logging roads?

A. Yes, occasionally.

Q. And who was it that negotiated this particular matter with the Forest Service people?

(Testimony of H. G. Reinsch.)

A. Mr. Ellison.

Mr. Collins: You may cross examine.

Cross Examination

Q. (By Mr. Melchior): Actually when there was negotiation with the [72] Forest Service about the terms of the contract and its execution quite frequently there is correspondence on the part of Northwest Door Company directly to the Forest Service, isn't that so?

A. Well, that depends. If it is a practical matter, if it were out in the woods it would be taken up in the woods. On the other hand, if it was correspondence we probably would do it, with a copy of the letter to him if it concerned both of us because we wanted to be informed of everything that was going on because in the end we had the responsibility there to that extent.

Q. If it was a practical matter out in the woods it would be taken up right on the spot?

A. Yes, sir.

Q. But when you got into problems of computing prices and things like that, it was done in your office with the Service?

A. Well, if Mr. Ellison hadn't figured he was able to figure that timber profitably we would have been out of it.

The Court: That isn't the question. Did you from time to time correspond with the Forest Service concerning the amount that you owed the For-

(Testimony of H. G. Reinsch.)

est Service and the contract and so forth, matters pertaining to the execution of the contract? [73]

A. (Continuing) To the financial, yes, sir, sure.

Q. As a matter of fact the state has certain requirements about cleanup after the cut and all that. Did you undertake some negotiations with them?

A. That was all settled before we even started logging.

Q. Who settled that?

A. The contract provides for all the things that could be foreseen.

Q. Well, who made all the provisions, what party? A. For what was to be done?

Q. What person arranged for this cleanup matter and all of these preliminaries, things to anticipate, what could be foreseen?

A. The Forest Service.

Q. And who else on the other end?

A. Ellison.

Q. Not Northwest Door? A. No, sir.

Q. You mean that——

Mr. Melchior: May I have Exhibit 2, please.

Q. (Continuing) You mean before the contract was entered between the Forest Service and the private parties who were to take out this timber Ellison went to the Forest Service and discussed such things as maintenance of [74] truck roads or use of truck roads by other purchasers, fire lines, spark arrestors, tail tree equipment and things like that?

(Testimony of H. G. Reinsch.)

Mr. Collins: Just a minute please. I object to the question, your Honor, as assuming a fact not in evidence.

The Court: Well of course if there is—if that is the case Mr. Reinsch was in charge of this matter at that time and he should know about it.

Mr. Collins: Here is my point, your Honor. Mr. Reinsch was questioned about what happened after the Ellison job started on direct examination.

The Court: Well, we might have gotten into the difficulty by my intervening in the matter and now that it has been brought up I think we had better get it settled.

Mr. Collins: My objection is it is getting outside of the scope of direct.

The Court: Let's get it settled and I'd like to do it quickly so we can suspend for tonight.

Q. (Continuing) Do you remember the question?

A. You covered a lot of territory there, what the contract specified and in some cases it might not mean anything because when they approach the problem it has to be worked up on the ground by somebody and that somebody would be Ellison. [75]

Q. And you mean Northwest Door had nothing to do with any of the provisions that were in this contract?

A. We made the contract with the Forest Service with the intention of him fulfilling the thing profitably and me getting the logs, yes.

The Court: But the point is, Northwest Door

(Testimony of H. G. Reinsch.)

made the commitment to the Forest Service in the first instance?

The Witness: That is right.

The Court: And some parts of those responsibilities would be undertaken by Mr. Ellison because he was on the ground?

The Witness: Yes.

The Court: Others of them would be the responsibility of the Door Company having a contract to attend to it?

The Witness: Financially responsible, yes.

Q. You people could be held liable by the Department of Agriculture on this contract?

Mr. Collins: Objected to as calling for a conclusion of law.

The Court: Yes, it is a conclusion of a non-expert witness.

Mr. Melchior: All right.

The Court: Anything else?

Mr. Melchior: Yes, just a couple of questions.

The Clerk: Defendant's Exhibit A marked for identification.

(Defendant's Exhibit A marked for identification.)

Mr. Collins: Do I understand counsel is about to offer exhibits that were not listed in the pretrial order?

The Court: Yes, go ahead.

Mr. Collins: I will object.

The Court: We have got to see what they are because if they could have been anticipated and

(Testimony of H. G. Reinsch.)

something of that kind, why of course I will not admit them. On the other hand, if they arrived by virtue of something happening during the trial, I will consider them. Go ahead.

Q. You have Defendant's Exhibit A in front of you, Mr. Reinsch. Do you recognize the signature on the three letters which have been marked as that exhibit? A. The exhibit number?

Q. The signatures that appear on each of those sheets. A. Yes.

Q. Have you seen that signature before?

A. Yes, sir.

Q. Whose signature is it?

A. Mr. Ausserer's. [77]

Q. Is that the stationery of the Northwest Door Company? A. It is.

Q. On each of those sheets? A. Yes.

The Court: We are going to have to suspend over until tomorrow. I am anxious to conclude. We have been running long hours and under unusual circumstances lately.

Mr. Melchior: I am about through.

Q. You testified that certain correspondence with respect to the Agriculture Department on this contract was handled from your office. Let me ask you whether Defendant's Exhibit A for identification, three letters in front of you, are typical of such correspondence? A. Well——

Mr. Collins: Just a moment, if your Honor please, I will object to that question on two grounds. The matter obviously is an impeaching question.

(Testimony of H. G. Reinsch.)

The person who signed the exhibits has testified and no attempt has been made to impeach him with them. The witness did not sign the exhibits himself and they haven't been displayed to counsel.

The Court: We are in the process of identifying them. They have not been offered yet. They are in the process of identification. Go ahead. Do you recognize these letters? [78]

The Witness: Yes, sir.

The Court: Go ahead.

Q. Are they letters of the type you were referring to as the type of correspondence your company had with the Agriculture Department?

A. Well, when you asked the question before I believe you were referring to the operation of the logging.

Q. No, I just asked you this question right now. That is the only one I want you to answer.

A. That is correspondence that is routine correspondence. I might not even have known anything about that.

Q. The only thing I am asking you is whether this is routine correspondence of the type your company carried on with the Forest Service under this contract?

A. Yes, the first letter refers to scaling differentials.

Mr. Melchior: I now offer Exhibit A.

The Court: Anything further from Mr. Reinsch?

Mr. Melchior: No.

Mr. Collins: There may be, your Honor.

(Testimony of H. G. Reinsch.)

The Court: I am talking about counsel.

Mr. Collins: May I ask one question?

The Court: Certainly. [79]

Mr. Collins: Mr. Reinsch, when did you cease to be the manager of the log and lumber division?

The Witness: I retired January, 1952.

Mr. Collins: Your Honor, Exhibit A is objected to on the following grounds: First, it is irrelevant and immaterial in that the only purpose for which this correspondence could be offered, if it readily appear from examination of it, is that the legal conclusion as to Mr. Ellison's status made by the person who sent the letter. And secondly, that as examination of the witness will readily disclose, it does not cover anything that could not be anticipated and should have been marked and attached to the pretrial.

The Court: I will consider the matter in the morning. Anything further from Mr. Reinsch?

Mr. Melchior: No further cross examination.

Mr. Collins: On redirect we have a few brief questions.

The Court: All right.

Redirect Examination

Q. (By Mr. Collins): Mr. Reinsch, during the performance of the Forest Service contract was there any substitution made by agreement between the Forest Service people and Mr. Ellison [80] of one tract to be logged instead of one that had been specified in the contract?

Mr. Melchior: Just a moment. May I have that read?

(Testimony of H. G. Reinsch.)

The Court: Was there a substitution of one tract to be logged instead of one described in the contract. Is that it?

Mr. Melchior: Between whom, however? He said by agreement between.

Mr. Collins: I will take it in two questions.

Q. (Continuing) First, Mr. Reinsch——

The Court: I think it is going to take too long, gentlemen. I can't impose on these people. We will have to bring them back in the morning.

(Whereupon, at four-forty-five o'clock p.m., March 15, 1956, a recess was had until ten-five o'clock a.m., March 16, 1956, at which time witness Reinsch resumed the stand for continued redirect examination by Mr. Collins, and counsel being present, the following proceedings were had, to-wit:)

The Court: I reserved ruling on the admission of this exhibit and you said that you had some additional question or two on redirect and then it got too long and I cut you off. All right, go ahead.

Mr. Collins: Regarding this Exhibit A, your Honor, we offer to stipulate that each side waive the objection that the exhibit is not listed in the pretrial order.

The Court: I am not concerned about that. I am going to admit the exhibit over your objection as before in the case of exhibits submitted on the other side. The whole matter will be before the Court and we will consider what, if any, effect to give to it later. All right, go ahead.

(Testimony of H. G. Reinsch.)

Q. Referring to the Green Fork job during the course of this operation was there an arrangement made with the Forest Service to substitute for cutting a portion or a tract of timber that was not included in the Forest Service contract in the place of the tract of timber that was included in the Forest Service contract? Do you understand what I mean? A. A swap you mean?

Q. Yes. A. Yes, sir.

Q. Now by whom was that arrangement made with the Forest Service? A. Ellison did that.

Q. During the time that the Green Forks operation was in progress did Mr. Ellison furnish logs to Northwest [82] Door Company that came from any other source? A. Yes, sir.

Q. What was that source?

A. Ellison took some salvage sales on and some small cleanup sales on his own with which Northwest Door had no connections excepting we got the logs.

Q. Was the purchase of these logs from what we refer to as other sources, handled in the same way as the logs that came from the Green Forks tract were treated?

Mr. Melchior: I see no reason for going into that, your Honor. I object.

The Court: I will let the record be made. Overruled.

A. These logs were included with all the other logs and handled in the same manner through our

(Testimony of H. G. Reinsch.)

office as far as keeping accounts of scale records and so on.

Mr. Collins: You may cross examine.

The Court: Anything further?

Mr. Melchior: Nothing further.

The Court: You are excused now, Mr. Reinsch. I am sorry we had to bring you back for so brief a matter.

Call another.

(Witness excused.)

Mr. Collins: In view of the introduction of Exhibit A may I recall Mr. Ausserer? [83]

ROY L. AUSSERER

having been previously sworn on oath, was recalled as a witness on behalf of the Plaintiffs and testified as follows:

Further Direct Examination

Mr. Collins: May I have Exhibit A please. Will you please hand Exhibit A to Mr. Ausserer.

Q. Mr. Ausserer, do those documents that are Exhibit A bear your signature?

A. Yes, they do.

Q. Now during the period of time through which they are dated, that is, June through December, 1951, were you a policy-making officer or employee of Northwest Door Company?

A. I was not.

Q. Now for what purpose were these letters written by you?

A. Well, the one of June 15th and the one of

(Testimony of Roy L. Ausserer.)

December 11th, wait—the one of June 15th was written merely as a—bring our records of stumpage cut into accordance with the Forest Service records because the bookkeeping and keeping track of scale certificates and the footages on the scale certificates, was handled by the Northwest Door office because we had the personnel to do it there and we kept them in accord with the Forest Service records.

Q. Referring to the other letter, what purpose was it written for?

A. Well, since the name of the Northwest Door Company was on the bond furnished the Forest Service, naturally when the terms of the contract with the Forest Service had been fulfilled, we wanted to get us released.

Mr. Collins: May I see that exhibit please.

Q. Now in the letter dated October 18, 1951, which is the letter asking for the release of the bond you refer to Mr. Ellison as “contract logger” for the Northwest Door Company. Would you explain why you referred to him in that term and what you meant by it, if anything?

A. Well, actually nothing in particular was meant by it. It is a term by which we refer to practically anybody who logs from whom we buy logs or logs for us. They are either gypo or contract logger. It is generally a term of the industry. I might add that we usually used the word “gypo” to any small operator who brings in a load or two in due respect to a big logger who we call contract.

(Testimony of Roy L. Ausserer.)

The Court: Is that the distinction of gypo and contract?

The Witness: That is the way I always used it. I never liked the word "gypo" as well as the other one.

Mr. Collins: You may cross examine.

The Court: Anything further from this gentleman? [85]

Mr. Melchior: No, your Honor.

The Court: That is all, Mr. Ausserer. You may leave whenever you wish. Call another please.

(Witness excused.)

ROBERT F. ELLISON

being first duly sworn on oath, was called as a witness on his own behalf and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Robert F. Ellison, E-l-l-i-s-o-n.

Q. Where do you live, Mr. Ellison?

A. Woodland, Washington.

Q. And what is your occupation?

A. Well, I am a logger.

Q. And how long have you engaged in that pursuit?

A. Approximately twelve years.

Q. During that period have you been in the employ of anyone or have you been in business on your own account?

(Testimony of Robert F. Ellison.)

Mr. Melchior: I think that calls for a legal conclusion. I will object.

The Court: Well, go ahead.

Mr. Melchior: Just for the record. [86]

The Court: All right, but let him in narrative form get on with these matters as rapidly as we can. Go ahead.

A. I have been managing my own business during that period.

Q. Now in a general way what do you do in that business?

A. Well, it is a business of either acquiring timber and going through the process of removing the timber from the woods to a market, or point of market, and selling logs.

Q. Do you do any logging for other persons of timber owned by them? A. Yes.

Q. Now have you heard the term "contract logging"? A. Yes, I have.

Q. And what does that term mean to you?

A. Well, contract logging as I would understand it would be where you agree to remove the logs from the woods of someone else's logs for a certain price, we will say so many dollars. You fall them and buck them and load them on the trucks and haul them into a specified point for a fixed fee of so many dollars per thousand.

Q. Now when did the Green Fork timber stand first come to your attention?

A. I believe that I first heard about it the latter part of 1946 or early 1947.

(Testimony of Robert F. Ellison.)

Q. And from what source? [87]

A. Mr. Wall.

Q. Now did you at any time ever go up there and examine that area and look over the timber?

A. Yes, I did.

Q. And did you do so on more than one occasion? A. Yes.

Q. When was the first time you went up?

A. First time was in the early part of, or fairly early part of 1947. I went up with Mr. Wall the first time. He showed me.

Q. For what purpose did you and Mr. Wall go there?

A. Well, primarily the purpose of course was to look at this timber and project to see if it was feasible to buy the timber and complete the job and do it economically.

Q. What, if any, interest did you personally have in determining whether or not that could be done?

A. Well, I was interested in acquiring this timber in one manner or another. Naturally I wanted to look at it and be sure in my own mind that it was a good proposition.

Q. When was the second time you went up there?

A. Well, I think that it was very shortly within a few days after the first time. In between the times I had considerable discussion with Mr. Wall about how we could purchase this timber or how

(Testimony of Robert F. Ellison.)

I could, and I went back on my own to—that is, to look at it some more. [88]

Q. Now did you tentatively lay out a road system for access to that timber?

A. Yes. The work on the road system was actual detail work plan of profile that I did and was somewhat a little later I think in the summer of 1947.

Q. Was that prior to the time that timber was put up for sale in your, August or September of 1947?

A. Yes, yes it was.

Q. Now, did you make any determination as to what price could be paid for stumpage and still be permitted to be extracted as profit?

A. Yes, I had to do considerable work and figuring on that.

Q. Now was this information both as to the feasibility of getting the timber out, tentative road system you laid out and your conclusion as to the price that could be paid for timber communicated to the Northwest Door Company?

A. I communicated through their representative.

Q. Who was their representative?

A. Mr. Wall.

Q. Now thereafter was that timber sold by the Forest Service?

A. Yes, it was.

Q. Who bought that timber?

A. Well, Northwest Door and I bought it. [89]

Q. Will you explain why the transaction was handled in the name of Northwest Door Company?

A. Well, from the time I first looked at it I did

(Testimony of Robert F. Ellison.)

considerable figuring on how to finance it which I didn't think that I could. So in a discussion with Mr. Wall, why we talked about the possibility of Northwest Door financing it and that plan was decided on that that would be a very satisfactory way to get it.

Q. Now thereafter according to testimony you proceeded to extract that timber. Now when did you first begin to get timber out of that area?

A. I believe that we didn't remove any logs until approximately September of 1948.

Q. And will you explain why this approximately one year's delay?

A. Well, this job required seven and some fraction miles of road building improvement plus minimum of two or three more miles of new construction road that had to be all completed before you could remove any logs. And of course part of that time was during this winter condition where you couldn't build roads, so it delayed us for practically at least eight or nine months.

Q. Was this road network that was put in, was that the road network the Forest Service had laid out or not?

A. Well, they had their own first. We will say [90] they had their specifications for the type of road that had to be built there.

Q. To save time, Mr. Ellison, I am referring to the course of the road.

A. They did have a plan of the profile.

Q. Was their plan followed or was another one used?

(Testimony of Robert F. Ellison.)

A. Their plan was followed in part and another one was used in part.

Q. Now this deviation from their profile, by whom was that laid out? A. I laid that out.

Q. And was that the road plan that you had tentatively laid out when you were working up the data for a bid? A. Yes, it was.

Q. Now was this plan later approved by the Forest Service?

A. Yes, it was approved and they were—I might add they were very happy.

Q. Did Northwest Door approve this change or know anything about it?

A. Well, to my knowledge they didn't know anything about it, that is, until after the changes were under way or the work was being done they might have.

Q. Was a representative of Northwest Door Company present at any discussion with the [91] Forest Service people regarding this proposed change? A. No.

Q. Who was the individual that consummated the arrangement with the Forest Service? I don't mean their representative, I mean the other party?

A. Will you repeat that again? I didn't—

Q. What individual was it that negotiated this change with the Forest Service people?

A. Oh, well that was myself.

Q. Now after the Forest Service contract had been let you have testified that you started putting in roads. Now did you borrow any money to use

(Testimony of Robert F. Ellison.)

for that purpose? A. Yes, I did.

Q. How much?

A. Well, I borrowed a total from or I borrowed a total of a hundred thousand dollars in 1948.

Q. And from what source?

A. Northwest Door Company.

Q. Now did you put any additional money into this matter? A. Yes.

Q. How much?

A. In 1948 I remember approximately I believe around at least \$175,000 into that job during 1948.

Q. Did that figure, that \$175,000 include the [92] money you borrowed from Northwest Door?

A. That was a part of it.

Q. And what was the source of the other \$75,000?

A. Well, it was monies that I had of my own or other resources that I was able to raise money.

Q. Now, Mr. Ellison, you were present in court, heard Mr. Reinsch's testimony? A. Yes.

Q. Do you recall Mr. Reinsch testified there had been an exchange, a swap, of the tract of timber by the Forest Service not included in that Department of Agriculture contract to replace a tract of timber that was included in the Forest Service contract, do you remember that transaction? A. Yes, I do.

Q. Now prior to the time that that exchange was made did you get the permission of Northwest Door Company?

A. No, I didn't talk to them prior to—I think

(Testimony of Robert F. Ellison.)

I follow you on the question. Maybe you had better repeat it.

The Court: Well, he just wanted to know what, if any, contract you had with Northwest Door about this swap. That is what he means.

Q. Before it was made.

A. No, I didn't have any. [93]

Mr. Collins: May I have Exhibit 1 please.

Q. Mr. Ellison you have been handed Exhibit 1. It has been stipulated this is your income tax return for 1949. Now is the data that is contained in Exhibit 1, is that taken from your books and records?

A. Yes.

Q. And were these books and records kept by you in the regular course of your business?

A. Yes.

Q. And do these books and records, and incidentally Exhibit 1, reflect this Green Forks timber transaction?

A. Well they certainly would.

The Court: I think that is all agreed, isn't it? Any problem about this? Can't we get on with this a little faster?

Mr. Melchior: Yes, I think all of these formal exhibits——

The Court: Let's get on with it. Exhibit 1 is offered and there is no objection it is admitted in evidence.

(Plaintiff's Exhibit No. 1 admitted in evidence.)

The Court (Continuing): All right. How about the claim for refund 4 and the statutory notice of

(Testimony of Robert F. Ellison.)

deficiency 5? Can those be admitted in the same manner? [94]

Mr. Melchior: No objection to those or to 10 or 11.

The Court: All right, 4, 5, 10 and 11. Do you wish to offer each of those, Mr. Collins?

Mr. Collins: We will offer 4 and 5, your Honor, but——

The Court: All right, 4 and 5 are admitted. What about 10 and 11?

(Plaintiffs' Exhibits Nos. 4 and 5 admitted in evidence.)

Mr. Collins: I don't think we are going to need them, your Honor.

The Court: All right, they are not offered so they are not for now admitted. Go ahead.

Q. Now referring to timber that came from the Green Forks tract during the time that you got it out of the woods and brought it into the delivery point, did you treat that timber as your own?

A. Well, I certainly felt as though it was my own.

The Court: The answer is not responsive and it is stricken.

Q. Answer that question yes or no. A. Yes.

Q. Now did you pay any transportation tax on that timber?

A. On the trucking of it you mean? [95]

Q. Yes. A. No.

Q. Did you claim capital gain treatment on the timber? A. Yes.

(Testimony of Robert F. Ellison.)

Mr. Melchior: I think that is taken care of in the pretrial.

The Court: It is obvious it is, that is what the lawsuit is about.

Mr. Collins: You may cross.

The Court: Any cross?

Mr. Melchior: Just a couple of questions, your Honor.

Cross Examination

Q. (By Mr. Melchior): You say Mr. Wall first invited your attention to the Green Forks tract, Mr. Ellison? A. Yes, he did.

Q. You knew who he was working for at that time, didn't you? A. Yes, I did.

Q. And then this inspection which you made together with Mr. Wall, could that fairly be described as a cruise of the timber?

A. Was it a cruise of the timber? [96]

Q. Yes, sir.

A. The first trip we made was a cruise you might say, a spot cruise as far as we went. Mr. Wall is quite an elderly man and he couldn't walk too far so we did look at one area. The main thing, he showed me where it was an——

Q. But it was of this time an appraisal?

A. It was a preliminary look, yes.

Q. Just a look around to see what it was worth? That didn't represent a commitment in any direction?

A. Well, I don't believe on that first look we

(Testimony of Robert F. Ellison.)

could determine what it was worth. It was a preliminary worth.

Q. And at all times that you went in there prior to the bid you dealt with Mr. Wall and with full knowledge of his capacity, isn't that right?

A. Well, I had full knowledge of his capacity, yes.

Q. Now one thing you said in your direct testimony was that "Northwest Door and I" bought this land. Who signed the contract with the owner of the timber?

A. Representative for Northwest Door Company signed the contract.

Q. Did you make any contract with the timber owner? A. Forest Service.

Q. The Forest Service did own the timber, didn't it? [97]

A. Yes. I didn't make any direct contract in my name.

Q. Was there anything done in your name contractually with the Forest Service at all?

A. Not in connection with the sale.

Q. Now with respect to this road building which you undertook that you described on your direct testimony, isn't it a fact that that is a normal incident of timbering operation, logging operations? Under appropriate circumstances?

A. I don't believe it is an accepted fact it would be normal operations.

The Court: I don't know that that means very much to me one way or not. Normally in order to

(Testimony of Robert F. Ellison.)

get in and log a piece of timber you have got to have roads and ways of getting it out. In that sense it certainly is a normal part of logging operations, isn't it?

The Witness: Maybe I misinterpret——

The Court: Well, I think that is why—that is why I interjected. One or the other of you must be thinking of different things because you certainly can't log a tract of timber without putting roads in and some way of getting out of there, can you?

The Witness: May I——

Q. That is all I had in mind and the question the judge asked you, that is what I meant to ask you. [98]

A. You have to have roads to get the timber out.

The Court: Roads or chutes or railroad or some way of getting the logs out of there, don't you?

The Witness: But I might say this: Ordinarily the road is fixed before the sale as you have certain specifications, the road is made that way. This happens to be an exception there where it was rather—it was more attractive, we might say, economically to make these changes. The Forest Service was very cooperative in allowing me to do this and the end result was that they were very happy because we came up with a better road than what they had originally planned.

The Court: But that was simply one of the things you understood by your contract with Northwest Door, was to provide this very sort of thing,

(Testimony of Robert F. Ellison.)

wasn't it, Mr. Ellison? It says so in black and white right in the contract.

The Witness: Well, my contract with Northwest Door was, of course, to remove the logs.

The Court: Yes, and it also provides that you are to go in and do the road work and whatever is necessary to bring them out, is that right?

The Witness: Right, right.

The Court: All right, anything else?

Mr. Melchior: Nothing further.

The Court: That is all, Mr. Ellison, you may step aside please. Anything else? [99]

Mr. Collins: The next thing, your Honor, is request for admission number six and ruling on objection thereon.

The Court: All right, number six. Now let's see, what is the status of this? The request for admission by the Plaintiff number six. That reads as follows:

"The Treasury Department does not deny any capital gains treatment to purchasers of timber from any federal or state agency including the Department of Agriculture where the purchaser cuts, sells or uses said timber after having held the purchase contract for more than six months prior to the beginning of a taxable year in which the timber is utilized or sold."

All right, what is the problem about that?

Mr. Collins: The defendant has interposed an objection to that. I think Mr. Melchior would prefer to state it.

Mr. Melchior: I will be glad to state it.

The Court: Go ahead.

Mr. Melchior: I believe that this is not the proper subject for request for admissions. I think it is directed to a question of law. It contains inferences about construction of a number of words having a legal meaning. In any event it relates to administrative practice. Could have no bearing on [100] the lawsuit.

The Court: That is the way it appeals to me, Mr. Collins. What have you to say about it?

Mr. Collins: Well, our answer to that, your Honor, is that what we are asking for is a fact. We want to know how they treat these, and administrative treatment is considered by the courts in some instances as an aid to construction of a statute.

The Court: Well, if there were some administrative ruling or something of that kind, that ought to be presented here, of course. That would be one thing, but the way this question is framed it does seem to me to involve elements that require interpretation of law, actually require interpretation of the terms you have used in stating the request. I can't see that there is any requirement of answering a request of that kind. Now if there be, if you are shooting at some interpretation, some regulation, something of that kind, that is a different thing. If there is something of that kind, certainly the Government must answer if there be such. Now maybe you can make a statement in connection

with this. It will solve the whole problem and we will have an end of it.

Mr. Melchior: I can do that.

The Court: Do that.

Mr. Melchior: I don't know what Mr. Collins [101] has up his sleeve, if there is. I have nothing up mine. If there is some published memorandum I think that would be subject to judicial notice anyway.

The Court: Of course it would.

Mr. Melchior: And if there is, I don't know.

The Court: That is the answer. Of course if there is such, of course I could take judicial knowledge of it. Are you aware of any regulation, interpretation or action of any kind by the Treasury Department placing an interpretation in this matter referred to in question six?

Mr. Melchior: No, your Honor. The only thing I can say is we took the position in the Carlen case and it was sustained by the Court that this time should be treated in one way, and we take the same position here. And the taxpayer knows because we assessed a deficiency.

The Court: Well, as far as your answer to *re-question* for admission is concerned, I take it your answer is that you are not aware of any Treasury Department regulation, interpretation or ruling of any kind that bears on the question presented?

Mr. Melchior: I can only speak for myself in that regard.

The Court: I understand, you are speaking for yourself. That is all you can do, of course.

Now if you have some regulation, interpretation [102] or you are aware of one that you want them to admit, if you will present it I will require them to answer that.

Mr. Collins: We frankly are not, your Honor.

The Court: That is the end of that then. Now what is next?

Mr. Collins: I would like to ask the Court to receive and consider as evidence the remainder of the requests for admission and the responses thereto.

The Court: That, of course, is a matter which follows as a matter from the rules.

Mr. Melchior: The ten days haven't expired. I think that is what Mr. Collins is driving at.

The Court: But you already said you are waiving the ten-day period and I am to interpret this record as though the ten days had expired.

Mr. Melchior: That is correct, your Honor.

The Court: Which I propose to do. All right, anything else?

Mr. Collins: The Plaintiffs rest, your Honor.

The Court: Very well.

Mr. Melchior: I call Mr. Tedrow. [103]

E. P. TEDROW

being first duly sworn on oath, was called as a witness on behalf of the Defendant and testified as follows:

Direct Examination

By Mr. Melchior:

The Clerk: State your full name and spell your last name.

(Testimony of E. P. Tedrow.)

The Witness: E. P. Tedrow, T-e-d-r-o-w.

Q. Where do you reside?

A. Vancouver, Washington.

Q. Where are you employed?

A. At Vancouver.

Q. In what capacity?

A. As Administrative Assistant Supervisor in connection with timber management.

Q. Of what business or company agency?

A. With the United States Forest Service, Pinchot National Forest.

Mr. Collins: I didn't get the name.

The Witness: Pinchot.

Q. Is that the forest in which the Green Forks is located? A. It is.

Q. And have you at this time personal custody of the records relating to the sale of timber from the Green Forks tract that is involved in this lawsuit? [104] A. I do.

Q. Have you inspected those files at my request?

A. Yes.

Q. What do those files indicate about the parties who had a contract right to cut timber owned by the Forest Service on that tract?

Mr. Collins: Just a moment, please, your Honor. I think we could save a lot of time here.

The Court: Good.

Mr. Collins: We certainly are willing to stipulate, admit and do not deny that the Forest Service contract which is in evidence is between two parties,

(Testimony of E. P. Tedrow.)

the Department of Agriculture and the Northwest Door Corporation.

The Court: Yes.

Mr. Collins: And if the purpose of the witness is simply to say that the contract means what it says, we will agree.

The Court: Yes, the contract and all other records of the timber management office with respect to the Pinchot National Forest, all reflect Northwest Door Company as the owner of the contract and the holder of the contract and having the right to remove, is that right?

The Witness: That is correct.

The Court: And Mr. Ellison is not mentioned in those records in any way as having that right?

The Witness: No.

Q. Is there any assignment of any kind recorded of that right?

Mr. Collins: We will stipulate there is not.

Mr. Melchior: That is all.

The Court: That is all, Mr. Tedrow, thank you. Anything else?

Mr. Melchior: No, we rest, your Honor.

Mr. Collins: Just a moment. I have a question.

The Court: I beg your pardon.

Cross Examination

Q. (By Mr. Collins): Now, Mr. Tedrow, do those records show that Vancouver Plywood Corporation had any interest in the timber contract?

A. They do not.

(Testimony of E. P. Tedrow.)

Q. Do those records show that at any time after the contract was let Vancouver Plywood Corporation acquired any interest in it?

A. They do not.

Mr. Collins: That is all.

The Court: That is all, Mr. Tedrow, you are excused and may leave whenever you wish. Government rests?

Mr. Melchior: It has rested, your Honor. [106]

The Court: All right, anything further? Both parties rest?

Mr. Collins: We have no rebuttal, your Honor.

The Court: Very well. I think we will go ahead and present the balance of the case. In all fairness perhaps in order that you may correct any misapprehension that I may have, I will outline to you briefly my tentative views of the case and then you can show me wherein I am wrong.

The matter of whether or no capital gains treatment is to be permitted in a given case or not, is strictly a matter of what the statute and any regulations promulgated pursuant thereto provide. In other words, it is not a matter that involves any element of discretion or so-called barnyard equity or anything of that kind. It is purely and strictly a matter of what the laws provide. If the laws provide that the gain is to be, capital gains treatment is to be permitted, then it is to be permitted no matter how we might view that or how we might like it to be otherwise.

Now in this type of situation we are always con-

fronted with a strict and literal interpretation of what the statute says. In other words, in order to be eligible for capital gains treatment a taxpayer must fall strictly and squarely and wholly within [107] the requirements of law in that particular. However happy or unhappy that result is, is a matter to be taken up with Congress and not with the Court.

Now the section in question, namely 117 (k) 1 of Title 26 reads in brief:

“If the taxpayer so elects upon his return for a taxable year the cutting of timber for sale or for use in the taxpayer’s trade or business during such year by the taxpayer who owns or has a contract right to cut such timber providing he owned it or held the contract right for a period more than six months prior to the beginning of the year, shall be considered as a sale——”

and so on, and therein lies the basis of whether or not capital gains treatment can be applied.

Now the Ninth Circuit has passed on a situation closely, if not wholly, analagous, namely in this Carlen case in 220 Fed. (2d) at 338. I have examined the Carlen case quite closely, re-read it several times, and it seems to me that it is inescapable that the situation presented in the present case if interpreted in the light of the Carlen case, requires a holding that the plaintiff is not entitled to a capital gains treatment upon the cutting of this timber. Now, wholly aside from the parol evidence [108] rule, assuming for the sake of the argument that all of the evidence admitted here concerning what

Mr. Ellison thought about it and why they did this, that and the other, assuming for the sake of the argument that all of that was admissible and should be taken in mind in interpreting this contract, even so I can't see how we can possibly get away from the terms of this contract.

This contract, Exhibit 4, makes it unmistakably plain the drafter of that contract, Mr. Eisenhower, apparently went to great lengths to repeat and reiterate time after time emphatically, in the most unreserved terms, that Ellison was merely performing services, that he was merely logging this timber which was owned by the Northwest Door, remained the property of Northwest Door from beginning to end. Under no conceivable situation under this contract did this timber ever come under the ownership of Ellison.

Now the only conceivable point that I can see in the case to differentiate this case from what is said in the Carlen case is this one clause in Section 117 (k) 1, namely, "by the taxpayer who has a contract right to cut such timber." Query: Does that mean that because Ellison had a contract with Northwest Door under which he was permitted to cut this timber, does that mean that he then qualifies within the meaning of this section? Or does this [109] clause, "taxpayer who has a contract right to cut" mean that he is in our context the one who has the contract right with the Government to cut the timber?

Now concededly that point is not squarely and exactly covered in the Carlen decision. At least it

doesn't seem so to me, but it is my judgment that considering the subject matter, namely capital gains treatment, which basically is founded on the idea that property has been acquired and held for a given period of time and then sold and any gain on that is a capital gain rather than normal income, conceding that that is the basic subject matter of this section 117 (k) 1, it just seems a wide stretch of interpretation to say that this taxpayer who has a contract right to cut means someone who is merely rendering logging services for the one who has the contract right to cut the timber.

Now those are my views and I will be glad to have you show me where I am wrong.

(Whereupon, Mr. Collins presented his closing argument and the following proceedings were had, to-wit:) [110]

The Court: Well, gentlemen, in so far as any issue of fact is concerned, if there be one in the case, and irrespective of the parol evidence rule or any other so-called technical rule pertaining either to the admission of evidence or the interpretation of contracts, I can only say that I have not the slightest doubt in my mind but that at the time this contract, Exhibit 3, was entered into it meant to the parties exactly what it says.

The contract was not lightly entered into. It was not some informal thing that parties unversed in law might draft, some exchange of letters that would in law constitute a contract, but which were drafted by persons unlearned in the law. It was only drafted after very full exploration of the vari-

ous ways in which those logs might be gotten out of that Green Fork tract, and after having explored first the idea of putting the title to the timber or the cut logs in Mr. Ellison and taking back some form of mortgage security or otherwise, that was abandoned for various reasons. And because of the situation at the time the only way that the Northwest Door was ready and willing to go forward with this was on the terms that are contained in this contract and essentially that the contract provides in the most unmistakable terms, reiterated and emphatically stated that under no circumstances whatever is Ellison to become the owner of the logs or to have any right, title or interest therein. [111]

I am now quoting from paragraph 5 of the contract. All that he was to be entitled to was compensation for his services in doing the logging, getting the logs out of there. It would just be a part of what I believe to be the true facts of the case. As well as written documents solemnly entered into, drafted by competent, able, experienced counsel. When this agreement of contract, Exhibit 3, was drafted, it was drafted not by some naive person unfamiliar with the meaning of the words he was drafting, but a person who knew full well exactly what the words meant and what they were intended to convey, and I have no doubt in my mind whatsoever that it was intended by both parties that it be so. Consequently it is my judgment that under no conceivable circumstances did Ellison acquire title either legal or equitable or otherwise in the

timber or the logs. If so, then 117 (k) 2 has no application because 117 (k) 2 leads off with the words, "In case of disposal of the timber by the owner thereof under any form of contract—" and so forth and so forth and so forth. Ellison was under no conceivable circumstances the owner of this timber either as it stood before it was cut, or after it was cut or after it was on the trucks or down at the pond or any other place.

In my judgment neither subsection 1 nor [112] subsection 2 are met by what seems to me to be the just unquestioned facts in the case. So as far as any factfinding is concerned, I am bound in good conscience to try, much as I'd like to give this tax relief to Mr. Ellison, particularly in view of the fact that Northwest Door didn't claim it, but I am not here to decide cases on any such basis as that. I have taken an oath to decide them according to my conscience and judgment, however good or bad that may be. That is the way I have got to decide them.

In my judgment Mr. Ellison has not qualified for the relief he seeks, regrettable as that may be. That is the judgment of the Court. [113]

PLAINTIFFS' EXHIBIT No. 3

AGREEMENT

This agreement, made and entered into, in triplicate, this 9th day of December, 1947, by and between Northwest Door Company, a Washington

corporation, and Vancouver Plywood Corporation, a Washington corporation, hereinafter referred to as the Owners, Parties of the First Part, and Robert Ellison, hereinafter referred to as the Logger, Party of the Second Part,

Witnesseth:

Whereas the Owners, acting through the Northwest Door Company, have entered into an agreement with the United States Department of Agriculture, Forest Service, under date of September 4, 1947, for the purchase of certain timber on the headwaters of Green Fork Creek, which is tributary to the East Fork of Lewis River, in the State of Washington, the total of which timber is approximately 30,387,000 feet board measure, more or less, all of which is more particularly described and referred to in the agreement herein specified, a copy of which is attached to this agreement for more particularity, and

Whereas the Logger is an experienced logging operator and has the equipment, machinery and men necessary for the logging of said timber, now, therefore,

It is hereby agreed between the parties hereto as follows:

1. The Logger does hereby agree to fall, buck, yard, load and transport to navigable water in the Columbia River all of the timber standing, lying or being on the property described in the Forest Service agreement hereinabove referred to where such logs, timber and forest products will be

dumped, rafted and scaled, all of which shall be at the sole cost and expense of the Logger.

2. The Logger hereby agrees to cut and remove said timber and forest products all in accordance with the terms, conditions and specifications set out in the Forest Service agreement hereinabove referred to.

3. The Logger agrees that he will at his own cost and expense construct and maintain any and all roads necessary for the removal of said timber and in accordance with the Forest Service agreement hereinabove referred to, and the direction of the Supervisor of Forest Service.

4. The Logger agrees that he will perform each and every condition of the Forest Service contract hereinabove referred to required under the terms thereof to be performed by the Northwest Door Company and that he will keep and save harmless the Northwest Door Company and the Vancouver Plywood Corporation from any and all claims, demands or liabilities of the United States Agricultural Department, Forest Service, or of any other person, firm or corporation. The Logger further agrees that he will perform said logging services in a good and workmanlike manner pursuant to the customs and practices of the Northwest Logging Industry, and more particularly in accordance with the rules and regulations of the Forestry Service of the United States of America and of the State of Washington, that he will pay and discharge all industrial insurance premiums and other taxes or assessments levied by any government, state or sub-

division of either upon the payroll or upon the business of said Logger to the end that said logs will be delivered to the Parties of the First Part free and clear of any claim, demand or liability of the Logger or any person, firm or corporation claiming by, through or under him.

5. It is hereby agreed between all of the parties hereto that said logs, timber and forest products shall be and remain the joint property of the Parties of the First Part herein mentioned and that the same shall be divided or otherwise disposed of in accordance with agreement between the Parties of the First Part, and that the Party of the Second Part shall not have any right, title or interest therein other than the right to receive his compensation herein agreed to be paid.

6. The Parties of the First Part agree to pay to the Logger for his services in logging and delivering said timber, logs and forest products to the Columbia River at the point above designated, where they will be boomed, rafted and scaled by a representative of the Columbia River Scaling Bureau or a representative of the Puget Sound Scaling and Grading Bureau, or such other scaler as the parties hereto may agree upon, but at the expense of the Logger, the Columbia River market price for said logs as determined on the day of scaling, less, however, the amount which the parties of the First Part are required to pay to the United States Agricultural Department, Forest Service, as stumpage or other costs as provided in said agreement with the Forest Service as hereinabove re-

ferred to; provided, however, that if the Parties of the First Part shall hereafter establish a reloading station at a point nearer the timber than the Wall Boom situate at Woodland, Washington, then the Parties of the First Part shall deduct from the amount otherwise payable to the Logger for logs delivered to such reload, the transportation costs of the logs, timber and forest products from the reload to the Wall Boom at Woodland, Washington, as determined by the hauling charges established by the State of Washington. If such reload is established, then the Logger shall deliver said logs, timber and forest products to such reload where he shall load them on railroad cars at his own expense.

7. It is the intention of this agreement that the compensation hereinabove agreed to be paid to the Logger shall be in full payment and discharge of all obligations due him from the Parties of the First Part.

8. It is further agreed between the parties that if the Logger shall request the Parties of the First Part to advance him any money for the construction of the road into the timber that the Parties of the First Part will advance such reasonable amount as they deem necessary to complete such road construction if such road has first been approved by them, and the amount so advanced shall be repaid to the Parties of the First Part by the Logger; provided, however, the Parties of the First Part are hereby authorized to deduct from each and every raft or load of logs, timber or forest

products delivered to them by the Logger a sum per thousand feet board measure of such products so delivered equal to the amount of money so advanced by the Parties of the First Part divided by the remaining number of such one thousand feet unit of logs, timber and forest products to be cut and transported over such road; provided, however, all of such money so advanced for road purposes shall be repaid by the Logger from the first 25 million feet board measure of such timber, logs and forest products cut and removed by the Logger from the lands described in the Forest Service contract above referred to.

9. The Logger agrees that he will commence the construction of roads and the logging of timber under said Forest Service contract above referred to not later than November 1, 1947, and will thereafter continuously and diligently operate under said agreement in order to remove all of the timber covered by said Forest Service contract as speedily as possible.

10. It is further agreed between the parties that if the Logger shall violate any of the terms or conditions of the Forest Service agreement above referred to, or this agreement, the Parties of the First Part may cancel and terminate this agreement and forfeit any interest of the Logger therein, including any logs or timber felled or bucked, or not otherwise delivered to the Parties of the First Part. In the event of such cancellation or termination of this agreement, the Parties of the First Part may take and use any or all of the

equipment, machinery, tools, buildings, trucks, roads, easements and other rights, privileges or property used by the Logger in the work of logging said timber herein described and use the same for the purpose of completing the logging of said premises, and at the completion of said logging, will return such equipment to the Logger in as good condition as when taken or received by the Parties of the First Part, reasonable wear and tear and damage by the elements excepted.

In witness whereof, the parties hereto have executed this agreement the day and year first above written.

Northwest Door Company

/s/ By Geo. Raknes,

Its Vice President

Vancouver Plywood Corporation

Vancouver Plywood & Veneer Co.

/s/ By J. Powers,

Its Secretary and General Manager

Owners, Parties of the First Part

/s/ R. F. Ellison,

Logger, Party of the Second Part

PLAINTIFFS' EXHIBIT No. 6

MINUTES OF MEETING

Vancouver Plywood Company, Vancouver, Wash.

October 24, 1947

Present: J. Powers, C. Hovey, H. E. Tenzler and Geo. Raknes.

Subject: Green Fork Contract.

Prior to meeting with Ellison, discussed items mentioned by Ellison to Wall and other points in Contract commented on in Powers letter.

Agreed contract should not contain any provision regarding sharing loss if Ellison suffered a loss on entire job. Also not to bring matter up in meeting with Ellison.

Informed Powers that we had planned, in estimating for Green Fork bid, to put in a reload at Moulton. Since it did not seem desirable for them to receive logs by rail asked if they prefer that we adjust with Ellison for any extra costs in the Reload and we own Reload, or if they wished it to be a partnership venture. They preferred that it be partnership.

Since logs may all be shipped to Puget Sound they indicated a readiness for us to turn over Columbia River logs in lieu of Green Fork logs. They were willing to look at Tillamook logs—not ready to agree to take until they see them. Brought up the matter of taking over Toutle River timber from us and specifically mentioned the NE/¼ of S12 T9N R3E. This piece contains 3577M of which 2530 is OG fir and cost an average of \$17.50 at the State Sale.

All agreed that sawmill or pulp logs have no trading value at present and seemed indifferent now who gets. Said they do peel Noble Fir. Felt division could be arranged later when logs start coming out.

Copies—Tenzler, Raknes, Reinsch

PLAINTIFFS' EXHIBIT No. 7

Northwest Door Co., Tacoma, Washington
Inter-Department Correspondence

To: H. E. Tenzler

August 4, 1948

From: Geo. Raknes

Subject: Green Forks timber exchange with Vancouver Plywood Co.

After further consideration of the above subject and after studying the values indicated for this timber based on current log prices, I have come to the opinion that it would be too difficult to agree with them on a purchase price, and I suggest that we make the following proposal to them in a shape of a letter:

Vancouver Plywood Company
Vancouver, Washington
Gentlemen:

In answer to the proposal contained in your letter of May 4, we believe that there are considerations involved which would make it inequitable to make this exchange on the basis of selling you the timber you suggest at our cost. As you know, on the Green Forks timber neither of us will make any gain or loss on the logs, as the contract has been turned over to Ellison. All we will receive are logs at current market prices. In the case of the state timber in the Toutle River area, we purchased this when timber prices were considerably lower than they are at present. Rather than attempt to put values on this timber based on current replacement costs, we want to make the following suggestion:

We own three tracts on the Toutle River, one in T9N, R4E, and the other two in T9N, R3E. The piece in Section 12, T9N, R4E all lies on one side of the river and will not involve any bridge construction. The other two pieces are almost adjacent but timber lies on both sides of the river. Between these two pieces lies the NW $\frac{1}{4}$ of Section 12, (T9N, R3E, which you own. We wish to retain the tract in Section 12, 9N, 4E, as a backlog since it can be logged on short notice if we find ourselves in an emergency for logs. We propose to sell you all the logs produced from the NE $\frac{1}{4}$ of Sec. 12, T9N, R3E, Application No. 18691, and from the W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ totaling 280 acres in Section 2, T9N, R3E. The timber on Section 12 contains 4,514 M ft. per Reilly's cruise and the timber in Section 2 contains 7,065 M ft. according to the State's appraisal cruise.

In our field work in appraising this timber before bidding on this sale, we estimated 65% of the fir on Section 2 was peelable and 58% of the fir on Section 12 was peelable. This would produce a total of 4,148 M ft. of peelers. The remainder of the stand on these two pieces would be 4,939 M ft. of other species. Your estimate of the peelers from the Green Forks tract was 2,850 M ft.

You will receive less sawmill and pulp type logs by this arrangement than we will and you will receive more peeler type logs than we will. It is difficult to appraise the trading value of these other logs at present but any advantage we might have in this footage we believe would be offset by the

higher grade logs you would be receiving as well as the larger footage of peeler logs that you would be receiving.

We believe trading on this basis would be equitable to both parties and would provide you with more timber for your Rocky Point Reload. It would be our plan to reimburse you for all money you have expended on the Green Forks purchase, and we would contract, as suggested by Mr. Hovey, to have these logs logged and delivered to you at Rocky Point.

Since our timber adjoins, we would have the lines surveyed and blazed, and we would provide suitable branding hammers so that the logger could brand all logs from our timber. We would pay the logger for his logging on the basis of \$24 camp run delivered to the reload and would pay the dumping and rafting charge and sell you all logs on prevailing market prices.

Mr. Raknes will call at your office within the next day or two to discuss this further with you and see if this plan is acceptable.

Yours truly,

NWD CO.

GR:dd

cc:HGR

[Endorsed]: Filed March 24, 1956.

[Endorsed]: No. 15318. United States Court of Appeals for the Ninth Circuit. Robert F. Ellison and Cleo A. (Ellison) Walker, Appellants, vs. William E. Frank, United States District Director of Internal Revenue for the District of Washington and Territory of Alaska, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: February 25, 1956.

Docketed: October 5, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15318

ROBERT F. ELLISON and CLEO A. (ELLI-
SON) WALKER, Appellants,

vs.

WILLIAM E. FRANK, United States District Di-
rector of Bureau of Internal Revenue for the
State of Washington and the Territory of
Alaska, Appellee.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellants hereby adopt as their statement of points and designation of record required by Rule 17 (6) of the Rules of this Court, the appellants'

statement of points and designation of contents of record on appeal appearing in the typewritten transcript of record in this cause certified by the Clerk of the United States District Court, Western District of Washington, Southern Division, and filed herein.

/s/ HUGH B. COLLINS

Of Attorneys for Appellants
Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 5, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION FOR THE SUBMISSION OF
THE ORIGINALS OF EXHIBITS IN
LIEU OF COPIES THEREOF

It is hereby agreed and stipulated by and between counsel for the respective parties hereto, that the Plaintiffs' Exhibits 1, 2, 4, 5, 8, and 9 and Defendant's Exhibit A be submitted to the United States Court of Appeals for the Ninth Circuit in lieu of printed copies thereof.

Dated: October 11, 1956.

/s/ JOHN L. FLYNN

Of Attorneys for Appellants

/s/ CHARLES K. RICE,

Assistant Attorney General,

Attorney for Appellee

[Endorsed]: Filed October 30, 1956. Paul P. O'Brien, Clerk.

1. The first part of the paper discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the success of any business or organization. The author provides a detailed overview of the various methods and systems used to collect and analyze data, highlighting the challenges and benefits of each approach. The text is written in a clear, concise, and professional style, making it accessible to a wide range of readers.

2. The second part of the paper focuses on the application of these methods in a real-world context. The author describes a case study of a company that has successfully implemented a new data management system. The case study illustrates the challenges faced by the company and the steps taken to overcome them. The author also discusses the results of the implementation and the impact on the company's performance. This part of the paper provides valuable insights into the practical application of the concepts discussed in the first part.

3. The third part of the paper discusses the future of data management and analysis. The author explores the emerging trends and technologies in the field, such as artificial intelligence and machine learning. The author also discusses the ethical implications of data management and the need for responsible data practices. The paper concludes with a summary of the key points and a call to action for the reader to embrace the future of data management.